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A
GENERAL VIEW
OF THE
LAW OF PROPERTY.

BY

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TO

R. A. M^cCALL, Esq., LL.D.,

ONE OF HIS MAJESTY'S COUNSEL, ATTORNEY-GENERAL OF THE
DUCHY OF LANCASTER AND A PAST TREASURER OF THE MIDDLE TEMPLE,

This Little Book

IS DEDICATED

AS

A MARK OF THE AUTHOR'S

FRIENDSHIP AND ESTEEM.

PREFACE

TO THE SIXTH EDITION.

In this Edition all decisions of importance to students reported up to March, 1919, have been noted, and the leading Statutes have been referred to throughout by their short titles.

Professor Sinclair Baxter is once more responsible for Appendices A to E, and for the statements as to Irish Law appearing in the text.

The Author has to thank his clerk, Mr. T. E. Lewis, for compiling the Tables of Cases and Statutes.

1, New Square, Lincoln's Inn,
24*th March*, 1919.

EXTRACT FROM PREFACE

TO THE FIRST EDITION.

In the following pages the author has attempted to state clearly and very concisely the main principles of the Law of Property.

Hitherto, most writers, in dealing with this subject, have treated separately of realty and personalty. The author has ventured to depart from this practice. Recent legislation has, it seems to him, so greatly approximated the law of realty to the law of personalty, that they may now be profitably considered together. The principles of both are to a large extent the same: where they differ, he believes that by contrasting them they may be made to illustrate each other.

Considerable experience as a law tutor has shown him that the prime object of a first book for students should be not so much to teach the reader the law as to enable him to learn it for himself. To accomplish this, the subject-matter must be arranged logically and systematically, and the general principles underlying its many details brought clearly and conspicuously out. This he has endeavoured to the best of his ability to do. He is quite aware of the dangers of attempting to arrange logically a body of law which, if it ever was so, has long ceased to be systematic, and to generalise where every general principle has been limited and restricted by special custom, judicial decision, or legislative enactment.

He cannot hope to have done this without being guilty of some oversights, and having perpetrated some blunders. He trusts, however, that the difficulty of the task will induce his readers to look on these with a merciful eye.

Before concluding, he must take the opportunity to thank his friend and former pupil, Mr. J. Sinclair Baxter, LL.B., for help extending over the greater part of the Work, and more especially as to Appendices A. to D.

1, Plowden Buildings, Temple,
17*th September,* 1895.

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TABLE OF ABBREVIATIONS.

(REPORTS.)

A. & E.	Adolphus and Ellis's Reports (*Common Law*, 1841 *to* 1852).
A. C.	Law Reports, House of Lords Cases (*since* 1890, *distinguished by the year*).
App. Cas.	Law Reports, House of Lords Cases (1875 *to* 1890).
Atk.	Atkyn's Reports (*Chancery*, 1736 *to* 1754).
Ball & B.	Ball and Beatty's Reports, Irish (*Chancery*, 1807 *to* 1814).
B. & A.	Barnewall and Alderson's Reports (*Common Law*, 1830 *to* 1834).
Beav.	Beavan's Reports (*Chancery*, 1838 *to* 1866).
Bac. Abr.	Bacon's Abridgment.
Bligh, N. S.	Bligh's Reports, New Series (*House of Lords Cases*, 1827 *to* 1837).
Bro. C. C.	Brown's Chancery Cases (1778 *to* 1794).
Burr.	Burrow's Reports (*Common Law*, 1756 *to* 1772).
Ch.	Law Reports, Chancery (*since* 1890, *distinguished by the year*).
Ch. App.	Law Reports, Chancery Appeals (1865 *to* 1875).
Ch. D.	Law Reports, Chancery Division (1875 *to* 1890).
C. P. Coop. temp. Cott.	Cooper's Chancery Reports in the time of Lord Cottenham (1846 *to* 1848).
Coll.	Collyer's Reports (*Chancery*, 1844 *to* 1846).
Cox	Cox's Reports (*Chancery*, 1744 *to* 1797).
Dears.	Dearsley's Crown Cases Reserved (1852 *to* 1856).
De G. M. & G.	De Gex, Macnaghten and Gordon's Reports (*Chancery*, 1851 *to* 1857).
De G. & Sm.	De Gex and Smale's Reports (*Chancery*, 1846 *to* 1852).
Dr. & War.	Drury and Warren's Reports, Irish (*Chancery*, 1841 *to* 1843).
Dyer	Dyer's Reports (*Common Law*, 1513 *to* 1582).

East	East's Reports (*Common Law*, 1800 *to* 1812).
Eden	Eden's Reports (*Chancery*, 1757 *to* 1766).
E. & B.	Ellis and Blackburn's Reports (*Common Law*, 1852 *to* 1857).
Eq. Cas. Abr.	Equity Cases Abridged (1667 *to* 1744).
Giff.	Gifford's Reports (*Chancery*, 1857 *to* 1865).
Ha.	Hare's Reports (*Chancery*, 1841 *to* 1853).
Hem. & M.	Hemming and Miller (*Chancery*, 1862 *to* 1865).
H. & B.	Hudson and Brooke's Reports, (Irish (*Common Law*, 1827 *to* 1831).
H. L. C.	Clarke's House of Lords Cases (1847 *to* 1866).
Ir. Eq.	Irish Equity Reports (1838 *to* 1850).
Ir. Ch.	Irish Chancery Reports (1850 *to* 1866).
Ir. C. L. R.	Irish Common Law Reports (1849 *to* 1866).
Ir. R. Eq.	Irish Reports, Equity Cases (1867 *to* 1878).
Ir. R. C. L.	Irish Reports, Common Law Cases (1867 *to* 1878).
Ir. R.	Irish Reports (*Common Law and Equity, since* 1893, *distinguished by the year*).
Ir. L. T. R.	Irish Law Times Reports (*all Courts*).
Jur.	Jurist Reports (*all Courts*, 1837 *to* 1866).
L. J. Ch.	Law Journal, Chancery Cases (*since* 1852).
L. J. Ex. or C. P.	Law Journal, Exchequer or Common Pleas Cases (1852 *to* 1875).
L. J. Q. B.	Law Journal, Queen's Bench Cases (*since* 1852).
L. R. Ir.	Law Reports, Ireland (*Chancery and Common Law*, 1866 *to* 1875).
L. R. C. P.	Law Reports, Common Pleas Cases (1866 *to* 1875).
L. R. Ex.	Law Reports, Exchequer Cases (1866 *to* 1875).
L. R. Q. B.	Law Reports, Queen's Bench Cases (1866 *to* 1875).
L. R. Eq.	Law Reports, Equity Cases (1866 *to* 1875).
L. R. P. & M.	Law Reports, Probate and Matrimonial Cases (1866 *to* 1875).
L. T.	Law Times Reports (*all Courts, since* 1859).
M. & C.	Mylne and Craig's Reports (*Chancery*, 1836 *to* 1840).
M. & M.	Moody and Malkin's Reports (*Common Law*, 1826 *to* 1830).

M. & W.	Meeson and Welsby's Reports (*Common Law,* 1836 *to* 1847).
Mac. & G.	Macnaghten and Gordon's Reports (*Chancery,* 1849 *to* 1851).
MacD.	MacDevitt's Land Cases, Irish.
Meriv.	Merivale's Reports (*Chancery,* 1815 *to* 1817).
P.	Law Reports, Probate Cases (*since* 1890, *distinguished by the year*).
P. Wms.	Peere Williams' Reports (*Chancery,* 1695 *to* 1735).
Ph.	Phillips' Reports (*Chancery,* 1841 *to* 1849).
Plow.	Plowden's Reports (*Common Law,* 1550 *to* 1580).
Q. B.	Law Reports, Queen's Bench Cases (*since* 1890, *distinguished by the year*).
Q. B.	Adolphus and Ellis's Queen's Bench Reports (1841 *to* 1852).
Q. B. D.	Law Reports, Queen's Bench Division (1875 *to* 1890).
R. & My.	Russell and Mylne's Reports (*Chancery,* 1826 *to* 1829).
Raym.	Lord Raymond's Reports (*Common Law,* 1694 *to* 1732).
Rep.	Coke's Reports (*Common Law,* 1579 *to* 1616).
Rev. St.	Revised Statutes.
Salk.	Salkeld's Reports (*Common Law,* 1689 *to* 1711).
Sch. & L.	Schoales and Lefroy's Reports, Irish (*Chancery,* 1802 *to* 1806).
Sim.	Simon's Reports (*Chancery,* 1826 *to* 1849).
Sm. L. C.	Smith's Leading Cases (*Common Law*).
Strange	Strange's Reports (*Common Law,* 1716 *to* 1746).
T. R.	Durnford and East's Term Reports (*Common Law,* 1785 *to* 1800).
Taunt.	Taunton's Reports (*Common Law,* 1807 *to* 1819).
Vent.	Ventris's Reports (*Common Law,* 1668 *to* 1691).
Vern.	Vernon's Reports (*Chancery,* 1680 *to* 1719).
Ves. Sen.	Vesey Senior's Reports (*Chancery,* 1747 *to* 1755).

Ves.	Vesey Junior's Reports (*Chancery*, 1789 *to* 1816).
Ves. & B.	Vesey and Beames' Reports (1812 *to* 1814).
W. & T.	White and Tudor's Leading Cases (*Chancery*).
W. N.	Weekly Notes (*all Courts, since* 1866).
W. R.	Weekly Reporter (*all Courts, since* 1852).
Wils.	Wilson's Reports (*Common Law*, 1742 *to* 1769).

(TEXT BOOKS.)

Bl. Com.	Blackstone's Commentaries (*by E. Christian*, 15*th edit.*, 1809).
Bro. Abr.	Brooke's Abridgment (1576).
Challis	Challis on Real Property (2*nd edit.*, 1892).
Co. Litt.	Coke on Littleton (*by Hargrave and Butler, being Part I. of Coke's Institutes of the Laws of England*, 17*th edit.*, 1817).
Digby's Real Pro.	Digby's History of the Law of Real Property (3*rd edit.*, 1884).
Far. Pow.	Farwell on Powers (2*nd edit.*, 1893).
Gilb. Ten.	Gilbert's Law of Tenures (*by C. Watkins*, 5*th edit.*, 1824).
Hawk. P. C.	Hawkins on Pleas of the Crown (*by J. Curwood*, 8*th edit.*, 1824).
Hood & Challis	Hood and Challis on the Conveyancing and Settled Land Acts (5*th edit.*, 1898).
Inst.	Coke's Institutes of the Laws of England (*Parts II., III., and IV.*, 1817).
Key & El.	Key and Elphinstone's Precedents in Conveyancing (6*th edit.*, 1901).
Litt.	Littleton's Tenures (*Translation by Coke, supra*).
P. & M. Hist. of Eng. Law	Pollock and Maitland's History of English Law (1895).
P. & W. on Possession	Pollock and Wright on Possession.
Prest. Abst.	Preston on Abstracts of Title (2*nd edit.*, 1824).

Prest. Est.	Preston on Estates (1820).
Rob. Gav.	Robinson on Gavelkind (*3rd edit.*, 1829).
Rolle Abr.	Rolle's Abridgment.
R. S. C.	Rules of the Supreme Court.
Shep. Touch.	Sheppard's Touchstone of Common Assurances (*by Atherley, 8th edit.*, 1826).
Spence, Eq. Jur.	The Equitable Jurisdiction of the Court of Chancery (*by George Spence*, 1846).
Strahan's Convey.	A Concise Introduction to Conveyancing (*by J. Andrew Strahan, 2nd edit.*, 1919).
Strahan's Eq.	A Digest of Equity (*by J. Andrew Strahan* and *G. B. Kenrick, 3rd edit.*, 1913).
Strahan's Leading Cases	Leading Cases in Equity (*by J. Andrew Strahan*, 1912).
Strahan's Mort.	The General Law of Mortgages (*by J. Andrew Strahan, 2nd edit.*, 1913).
Strahan's Wills	The Law of Wills (*by J. Andrew Strahan*, 1908).
Strah. & Old. Copyright	The Copyright Act, 1911 (*by J. Andrew Strahan* and *Norman Oldham*, 1911).
Strah. & Old. Partnership	The Law of Partnership (*by J. Andrew Strahan* and *Norman Oldham*, 1914).
Stubbs' Con. Hist.	Stubbs' Constitutional History of England (1863).
Sug. Pow.	A Practical Treatise on Powers (*by E. Sugden (Lord St. Leonards)*, *8th edit.*, 1861).
Theobald on Wills	A Concise Treatise on the Law of Wills (*by H. S. Theobald, K.C., 6th edit.*, 1905).
Under. & Stra. on Wills	Principles of the Interpretation of Wills and Settlements (*by A. Underhill* and *J. Andrew Strahan, 2nd edit.*, 1906).
Vin. Abr.	Viner's Abridgment.

A GENERAL VIEW
OF THE
LAW OF PROPERTY.

PART I.
OWNERSHIP AND THINGS OWNED.

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Meanings of "Property."—"Property" is a word of many meanings. Austin, in his "Lectures on Jurisprudence" (Lecture XLVII.), enumerates some eleven senses in which it is more or less commonly used. With most of these we are not at present concerned. It is sufficient for our purpose to refer to two of them, as by the failure clearly to distinguish between these much confusion may be introduced into an exposition of the law of property.

The term "property," then, is commonly used to signify the *right of ownership* in a thing. That is what we mean by it when we say that the property in certain lands is in a certain person. On the other hand, it is also commonly used to signify the *thing* over which a right of ownership subsists. That is what we mean by it when we say that certain lands are a certain person's property. As far as the law is concerned, it matters little in which of these senses the term is used, but it matters a great deal that it should always be clear in which sense it is being used. To prevent any ambiguity we will hereafter always use it in the former sense, that is, as meaning the right of ownership and not the thing owned, unless in cases when the context will clearly show that the latter meaning is intended.

1. **Absolute Ownership.**—The question then arises, what is meant by the right of ownership? No satisfactory definition of the term exists, but perhaps the best description is that given by Austin. He describes the right of ownership, or *dominium*, as a right availing against the whole world "over a determinate thing, indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration." (Austin, Lecture XLVII.)

If we examine this description part by part we shall have clearer notions both as to the legal and as to the popular meaning of the term "property."

(a) **Nature of Right.**—Legal rights, that is, rights which will be protected and enforced by the law courts, are divided primarily into rights availing against a particular person or particular persons (or *jura in personam*) and rights availing against the whole world (or *jura in rem*). Now ownership is a right availing against the whole world. If a person agrees for a certain payment to build a house for me, I have a right against that person, and that person only, to have the house built or to be compensated in case of default on his part. That is a right arising out of contract, and is availing only against the particular person with whom I contracted. If a person publishes a libel upon me I have a right against that person, and that person only, to recover damages from him for publishing such libel. That is a right arising out of a wrong or tort, and is availing only against the person who committed the tort. But if I own land I have a right not merely against the person from whom I bought it, but against the world at large, to enjoy that land absolutely and exclusively without interference from anyone. The right of ownership is then a *jus in rem*.[1]

(b) **Subject-matter of Right.** -The next point to be noted in this description of the right of ownership is that it must subsist over a thing; and the thing it subsists over must be a determinate thing, that is, an actually existing physical object. Thus we can own a piece of land or a sum of money; that is, we can have it in our exclusive possession and control, to do with it as we like, dispose of it to whom we like, and keep it as long as we like. We cannot in this sense own a debt, or a patent, or a copyright, all of which are mere creations of the law, without any physical embodiments over which physical power can be exercised. Accordingly, strictly speaking, such rights are not property at all according to Austin, and in this work we will not treat them as such. As, however, most of them are also *jura in rem* and of pecuniary value, and otherwise come within the popular conception of proprietary rights, it is usual, and on the whole convenient, to deal with rights of this kind in treatises on the law of property. We will, therefore, after we have disposed of the ownership of physical objects, devote a chapter to their consideration. (*See Part VI.*)

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[1] The division of rights into *jura in rem* and *jura in personam* is not strictly observed in English law. Thus, the right of a *cestui que trust* is a right of property, and yet it is not a right against the whole world, but merely a right *in personam* against the trustee and anyone who obtains the trust property from him without giving value or with notice of the trust.

Physical objects alone, then, are, strictly speaking, subjects of ownership. But all physical objects cannot be owned. For example, there cannot by English law be any property in a human body, living or dead, though the executors of a dead testator are entitled to possession of his body for the purpose of burial. (*Williams* v. *Williams*, 20 Ch. D. 659.) With this exception, however, it may be said generally that any material thing of which physical possession can be taken, may be owned.

Material things, however, of which physical possession has been taken by no one, are the property of no one (*res nullius*). Thus, wild birds, wild beasts, fish in rivers or in the sea, belong to nobody until they are captured, when they become, as a rule, the property of the captor. (*See infra, p.* 231. As long as he keeps possession of them his property in them continues; but should they escape completely out of his possession they are again *res nullius*, and will become the property of the first person who recaptures them. Domestic animals do not, of course, come within this rule, the property of their owner in them being as complete and permanent as in land or other goods; but what at first sight appears to constitute an exception to the rule occurs in the case of animals which, though strictly speaking not domestic nor in captivity, yet nevertheless have what is called an *animus revertendi*, such, for example, as pigeons attached to a dovecot; as long as such pigeons habitually return to the dovecot the law regards them as the property of the owner of the dovecot. This, however, is rather an extension of the notion of possession than of the doctrine of property. And a partial exception has been created by the Game Laws, which seem to give to the occupier of land a certain transient property in the game on the land as long as it remains upon it. (*See*

Rigg v. *Earl of Lonsdale,* 1 H. & N. 923.) Independently of the Game Laws, the occupier of land seems to be entitled to all wild animals actually killed or captured, whether by himself or a stranger, on his own land, though it is doubtful if this be so when the wild animal was started on another's land and pursued to and taken upon his. (*But see Blades* v. *Higgs,* 11 H. of L. 621, and 2 Bl. Com. 419. As to deer, see *Threlkeld* v. *Smith,* (1901) 2 Q. B. 531.)

Whether there can be any property, strictly speaking, in water, has been doubted. (2 Bl. Com. 18.) Recent decisions seem to have dissipated that doubt. In the words of Lord Halsbury, L. C., in *Mayor, &c. of Bradford* v. *Pickles* ((1895) A. C. 587, at p. 593), "you may have a property in the water when it is collected and appropriated and reduced into possession." But, as Blackstone says, water is "a moveable, wandering thing," and if it escapes out of your possession no action will lie for its recovery. (2 Bl. Com. 18.) Moreover, the fact that water flows over your land, or percolates through it, does not put it in your possession so as to give you a property in it, but merely entitles you to the free use of it as long as it is on your land. (*See infra, p.* 330.) Water, however, confined in a pond or reservoir upon your land, or, it is submitted, water lying in a well or in the strata of your land, is as long as it remains on or in your land your property, though, as it is regarded as parcel of the land, it may not be the subject of larceny at common law, which it would be if separated from the land and confined in cisterns or pipes. (*Ferrens* v. *O'Brien,* 11 Q. B. D. 21; and see 2 Bl. Com. 394.)

Other "moveable, wandering things," such as gases or electricity, seem to be subject to the same rule as water. As long as they are in the physical possession of the owner he has a property in them. (*Reg.* v. *White,* Dears. 203.) But once they completely escape from his possession, they become *res nullius.* (P. & W. on Possession, p. 232.)

Divisions of Things Owned.—Physical objects which are subject to ownership may be divided in two ways. They may be divided according to their legal characteristics, or they may be divided according to their natural characteristics. In the former case, the classes of things resulting will be classes peculiar to the legal system under which the division is made. In the latter case, the classes will be independent of any legal system, as the principle of division is the inherent quality of the things themselves. In other words, the actual division in the former case is between different kinds of ownership, while in the latter case it is truly between different kinds of things owned; or, to put it more shortly, the former is a technical, the latter a natural, division of things owned.

Technical Divisions of English Law.—One of the earliest classifications of things owned recognized by English law was that into *lands, tenements,* and *hereditaments* on the one hand, and *goods* and *chattels* on the other. By *lands* were meant not merely the soil, but everything built upon it (as houses), and everything growing upon it (as trees), and everything beneath to the very centre (as minerals). (Co. Litt. 4 a.) As the maxim says, *Cujus est solum, ejus est usque ad cœlum, et usque ad inferos. Tenements* meant anything that could be held by common law tenure. We shall see later on that it is a fundamental principle of English law that all land belongs to the Crown, and subjects can only hold it as tenants, while a subject's ownership in goods is absolute. *Hereditaments* meant things which, on the death of the owner intestate, went to his heir—not to his administrators—by hereditary succession, and not by special occupancy. (Co. Litt. 6 a; *infra, p.* 60.) It will be noted that the terms tenements and hereditaments, as thus used, referred rather to the nature of the owners' rights than to the nature of the thing over which they subsisted. All things not lands, tenements, or hereditaments, were *goods* and *chattels.*

This division, as we shall see, is still of much practical importance.[1]

Out of this earlier classification of things owned rose the later classification which now obtains—that into *Things Real*, or *Realty*, and *Things Personal*, or *Personalty*. It arose in this way. For the wrongful taking of land a real action lay; that is, an action in which the thing itself (*res*) could be recovered. For the wrongful taking of goods, on the other hand, only a personal action lay; that is, an action in which the sole remedy was by way of damages against the person of the wrongdoer. The reason of this difference of remedy was in the difference in the nature of the things themselves, land (unlike goods) being incapable of being so dealt with as to be destroyed, taken out of the jurisdiction of the Court, or otherwise rendered irrecoverable. Lawyers, however, took not the reason of the remedy but the remedy itself as the principle on which to divide things owned. And when new interests in land grew up, for the wrongful taking of which the law gave only a personal action, it ranked land, as far as these new interests in it were concerned, as personalty, and attached to its ownership the characteristics of ownership of goods. Of course, no doctrine of lawyers could change the essential nature of the thing, and the law as to goods was necessarily considerably altered when it came to be applied to land. Lawyers recognized this alteration by calling interests in land for which no real action lay not simply chattels, but *chattels real*,[2] that is, goods partaking of the nature of land. Sometimes they are treated as if they were a class of things by themselves, as in the classification "Realty, Personalty, and Mixed."

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[1] The terms "tenements" and "hereditaments" are still in regular use in conveyancing, but the reader is not to imagine when he encounters them in a deed that they have always there the meaning given to them in the text. Conveyancers use them in a very lax way. Thus, tenement is constantly used as equivalent to messuage or house; and not merely life estates, but chattels real are often described as hereditaments, which neither of them properly are. As for the word "land" or "lands," though *primâ facie* it always has the meaning above given it, yet if the context shows it was intended to bear a different meaning the Court will read it in that sense.

[2] For meaning of chattels real, see *Re Fraser*, (1904) 1 Ch. 111.

The whole system of real actions has disappeared (Real Property Limitation Act, 1833, s. 35; Fines and Recoveries Act, 1833; *see infra, p.* 49), and now the thing itself can be recovered in an action, even though it be a chattel real, and sometimes even though it be pure personalty. But the old classification of things owned into realty and personalty still maintains itself throughout English law.[1]

The classification, like other technical classifications, is one rather of kinds of ownership than of kinds of things. Real ownership and personal ownership have of late approximated greatly, chiefly by realty assuming legal attributes formerly characteristic of personalty. The primary difference now, from a public point of view, lies in the modes of devolution on the death of the owner, and from a lawyer's point of view, in the modes of conveying from one owner to another, and of parcelling out the ownership among successive persons—limiting the property as it is called. These will be explained later on.

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[1] It is to be remembered that when chattels real first came into existence they were in many respects mere personal contracts with the freeholder for the use of his land, and were therefore more akin to legal choses in action than legal interests in the land. The early lawyers then were quite right in treating them as personalty. When by force of statute they gradually became indefeasible interests in the land, their characteristics, it may be said, were already fixed. It may be suggested, however, that motives of convenience had some influence with the later lawyers in determining them still to regard chattels real as personalty. As personalty they could be assigned without livery of seisin, could be freely bequeathed, and were liable for their owner's debts, conveniences they would have largely lost if they had been treated as realty. It is interesting to contrast their history with that of beneficial interests arising under trusts, which came into existence after chattels real had become indefeasible legal interests in land. These at first were regarded as equitable choses in action. (*See Sir Moyle Finch's Case*, 4 Inst. 86.) That did not prevent the Court from subsequently turning them into equitable realty, with most of the incidents of the legal estate in the land in which they subsisted; but then equity had already relieved them of those ancient characteristics as to conveyance, &c., which had been found by the later lawyers so inconvenient in the case of legal realty. Compare on this point the reasons given by Maine why Roman lawyers added all new forms of property to the *res nec mancipi,* and not to the *res mancipi.* (Ancient Law, 273 *et seq.*)

As to the things which are subject to each of these kinds of ownership, we are concerned now only with physical objects, and of these land alone is subject to real ownership. Land here is used in the legal significance already explained. Personal ownership, on the other hand, attaches to chattels real and to all ownable things which are not land, nor connected with land, such as money, cattle, furniture, books, clothes, &c. Even some things connected with land are for practical purposes personalty while they are still connected with it, as growing crops (*see* "*Emblements*," *p.* 66, *infra*) and trade machinery (*see* "*Fixtures*," *pp.* 67, 94—97, *infra*); and other things remain realty as long as they are actually connected with land, becoming personalty as soon as they are severed from it, as trees or minerals or buildings. Game and wild animals (animals *feræ naturæ*), while uncaptured, are not, strictly speaking, owned at all—as has been explained already—but the right to capture them on the land goes with the legal possession of the land, unless parted therefrom by agreement or franchise (*see infra, p.* 336). When captured they are personalty.

Another technical classification of things owned which is recognized in English law is the division into *things corporeal* and *things incorporeal*. Originally this division was confined to hereditaments, and arose out of the ancient system of conveyancing. By a corporeal hereditament was meant a hereditament which could be transferred *inter vivos* only by livery of seisin or actual delivery of the possession of the thing (*see infra, p.* 243); by an incorporeal hereditament, a hereditament which might be transferred *inter vivos* by a deed of grant. (*See infra, p.* 328.) Thus, a future interest in land—that is, one which does not entitle its owner to the possession of the land till an existing interest has come to an end (*see infra, p.* 144)—was an incorporeal hereditament, because, since its owner was not entitled at the time of the transfer to the possession of the land, if he was to be permitted to transfer the land at all, he must be allowed to transfer it without giving that possession which was not his to give. And all those detached rights over land belonging to another, such as rights to graze cattle on another's field, or to take fish in another's water, or to receive rent or tithes issuing out of another's land (*see infra, p.* 337 *et seq.*), carrying with them no right to the possession of the land itself, were also incorporeal hereditaments, and transferable *inter vivos* by grant. So, too, were those hereditaments which are merely rights in gross and are not connected with land or any other physical object, such as annuities and shares in ancient corporations. (*See infra, pp.* 355, 362.) These, since they have no physical existence, could not be transferred by delivery of possession.

The rule of the common law, which rendered livery of seisin the only valid mode of transfer of corporeal hereditaments, was long ago evaded, as we shall shortly see, and now it has been superseded by the Real Property Act, 1845; but the division between things corporeal and things incorporeal, though it has ceased to have any considerable importance, even as regards hereditaments, has not merely been preserved, but has by many writers been extended to goods and chattels. It is now used for the purpose of distinguishing between tangible things, such as lands and goods—that is, physical objects,—and certain rights over lands, such as rights of grazing cattle on another's land (*supra*), and rights which apply to no physical objects whatever, but are the mere creatures of the law, such as annuities (*supra*), debts (*infra, p.* 352), patent rights, copyrights, and such like rights (*see infra, p.* 364 *et seq.*), which, strictly speaking, are not property at all, but merely proprietary rights in the looser sense of those words. Used in this sense, the term "things incorporeal" may be, to some extent, convenient; but its convenience, at any rate in an elementary book, is more than counterbalanced by the fact that it confuses things which are physical objects with what are merely rights either over physical objects, or rights which refer to no physical objects, but to mere acts or conduct of individuals. In this work this division of things will not, accordingly, be used as the basis of any arrangement of the subject-matter.

Natural Divisions of Things Owned.—The most obvious and far-reaching classification of things owned is into *Immoveables* and *Moveables*. As we have seen, this is the classification which lies at the base of that into lands, tenements, and hereditaments, and goods and chattels, and of that into things real and things personal. It is one arising out of essential differences in the nature of the things themselves—differences which must affect the character of the ownership of each, and which the law cannot, even if it wishes, altogether disregard, as we have seen in the case of chattels real.

Immoveables are incapable of being taken beyond the jurisdiction of the Court, and though they may be damaged they are in their essence imperishable. Such being the case, it is obvious that the rights and the remedies of their owner must differ largely from those of the owner of a thing which is both moveable and destructible.

Whenever, henceforth, it is necessary to classify or distinguish kinds of things owned, we will adopt this division into things immoveable and things moveable, or, more shortly, into land and goods, treating the division into things real and things personal as what it really is—not primarily a classification of things owned, but a classification of rights of ownership, which, though originally based on the inherent differences in the nature of things owned, no longer follows the lines of those differences.

(c) **Extent of Right: Indefinite in Point of User.**—According to the dictum of Austin which has been cited, the first characteristic of the right of ownership, whether over land or goods, is that it entitles the owner to use the thing owned in such a variety of ways that it is impossible to define them. This right of user, it is to be observed, is not unlimited; it is only indefinite; incapable, that is, of being exhaustively summed up. In English law, it is usually negatively described as the right to use your land and goods in all ways, save such as would injure those of another person. (*Sic utere tuo ut alienum non lædas.*) Thus, the owner of a close of land may farm it, let it lie fallow, build upon it, take the soil off it, or the minerals or clay out of it, live upon it, ride or walk over it, or use it in any of a hundred other ways just as he may feel inclined. But he cannot dig a hole on the confines of it so deep as to cause the soil of his neighbour's land to fall into it (*see infra, p.* 329), nor can he carry on a noisome trade or do any other act upon it which will be a nuisance to his neighbour. Acts of ownership such as these would be so using his land as to injure the right of his neighbour to the full enjoyment of his.

Unrestricted in Point of Disposition.—The second characteristic of ownership, according to Austin, is that the owner's right to dispose of the thing owned is unrestricted. This is what is called in law the power of alienation. Formerly, in English law, this power was restricted as to some kinds of things, and more particularly as to interests in land, both in respect of alienation *inter vivos* and alienation by will. But the leaning of the Courts and the tendency of legislation has been towards freeing the right to alienate from all restriction, and now it may be said generally that any person not under disability may dispose freely of any thing or any interest in a thing to which he is entitled. (*See infra, p.* 373.)

Unlimited in Point of Duration.—The third characteristic, according to Austin, of the right of ownership it that it is unlimited in point of duration. This means not that the right exists for ever, but that it is capable of existing as long as the thing owned exists. Ownership in perishable articles, like fruit or flowers, is just as complete as it is in articles that may last for ever, like gems or land, provided that in neither case is there a limit of time fixed at which the right must expire, whether the thing is then in existence or not. If such a limit be fixed, the ownership is only temporary and incomplete.

2. **Partial Ownership.**—Ownership, then, is a right of unlimited duration to use the thing owned in an indefinite number of ways and to dispose of it freely. But, as has already been indicated, in many cases some of these characteristics of ownership may be absent or qualified. Then the ownership is not complete or absolute, but incomplete or partial.

Incomplete or partial ownership may arise in either of two ways. The rights of a particular owner or of a particular class of owners may be cut down by positive law. We have examples of that in the case of infants' property and estates settled by Parliament to accompany titles. In these instances the power of disposition has been taken away from the owner; in the first case temporarily; in the second, permanently. Restrictions such as these, however, since they usually arise out of the personal status of the owner, are not regarded so much as restrictions on his ownership as incapacities on his part to enjoy full ownership. (*See Part VII.*)

The second, and more important, way in which partial ownership arises is through the division of the full ownership among various persons. For example, the right of user may be divided between two or more persons, while all the other rights of ownership are vested in one of them. Thus, in the case of a right of way (*infra, p.* 330), one person is entitled to use the land to walk upon, while another is entitled to all the remainder of the ownership in it. Again, one person may be entitled to have his house supported by the soil or house belonging to another person. (*Infra, p.* 330.) In both these cases the user of the soil or house is divided between these two persons. Again, the right of disposition may be in one person, while all the other rights of ownership are in others. Thus, it is frequently provided in marriage settlements that the power of appointment (or disposition) of the settled funds of the wife shall after the wife's death be vested in the husband who may have no beneficial interest in the property. Here the right of disposition over the wife's property is separated from the other rights of ownership.

Again, ownership may be divided among several persons as to duration: one may be entitled to the thing owned for life or for a number of years, and another may be entitled to it on the death of the first person or on the expiration of his term of years. This is incomparably the most common mode of dividing ownership, and also the most important, since limiting one person's right to a thing in point of time imposes on him a limit as to user and as to disposition also. If a man's ownership of anything is merely temporary, he must, on equitable principles, be restrained from using the thing in such a way as to damage the next owner of it, and he must not dispose (at any rate for his own benefit) of any greater right to the thing than he himself possesses.[1]

Interest in Things Owned.—It is not usual to regard a person having merely a share in the right of user or of disposition of a thing as having any share in its ownership. The share he possesses is so small compared to the whole right that it would only lead to confusion to rank him beside the person entitled to the remainder of the ownership. It is usual to regard the latter as the sole owner and the former as entitled merely to a right over a thing belonging to the other—a *jus in re aliena*, as civilians call it. This is so, even in the case of a person having the absolute right of disposition (or, as it is called, a general power of appointment) over a thing, without the other rights of an owner, though such an authority enables him to turn himself or anyone else into owner at any time, and therefore is equivalent to potential ownership.[1]

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[1] This mode of dividing ownership has no application at common law to the ownership of pure personalty (*see infra, p.* 19), and it was not known to Roman law:—what we call an estate for life was in Roman law a mere servitude, or right against the owner.

When the ownership is divided as to duration, all the persons between whom the whole ownership is parcelled out are regarded as owners. Each of them has what is called an *interest* in the thing owned, while all together they have *the* interest or the whole interest in it.

Arrangement of the Work.—In the following pages we will consider, firstly, What interests can, according to English law, subsist in things owned; secondly, How these interests can be held; and thirdly, How they can be acquired and disposed of. After that we will consider those rights in things owned by others to which we have already referred, and those rights which are commonly considered property, but which, as they do not subsist over physical objects, are not property in the strict sense of the term. Finally, we will discuss the disabilities which the law imposes upon certain persons in relation to ownership and proprietary rights.

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[1] Though technically the donee of a general power of appointment is never considered the owner of the property over which the power subsists, yet for practical purposes he is often treated as owner. For instances of this, see *infra, pp.* 177, 178.

PART II.

KINDS OF INTERESTS IN THINGS OWNED.

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Sources of English Law.—English jurisprudence—by which we mean the whole system of justice administered by the King's Courts—is derived from three sources. The first of these is what is called common law—that is, the ancient law and customs of the realm which are presumed to have existed from time immemorial. All the new law created by the decisions of judges of the common law Courts is, in theory, only new applications of the original principles of the common law. The second source is equity. Unlike the common law, equity avowedly arises out of the decisions of the judges of the Court of Chancery in times past. At the present time, as in the case of the common law, all the new law created by decisions of Chancery judges is, in theory, assumed to be merely new applications of the principles laid down by their predecessors long ago.[1] The third source of law is Acts of Parliament. As these have never been administered by distinct Courts, as common law and equity long were, and to a certain extent still are, administered, and as, moreover, they constitute in no sense a system of law proceeding on general principles, which common law and equity both largely are, it is neither customary nor convenient to treat of them separately from the two systems which they are intended to alter and amend.

The authority of the common law arises from the assumption that it always has been the law; that of equity from its presumed ethical superiority to the common law (from which superiority it derives its name); and that of Acts of Parliament from their being enacted as law by an authority entitled to legislate.

Formerly, equity and the common law were quite separately administered by distinct Courts. Mere equitable rights were not recognized in the Common Law Courts; and the Chancery Courts constantly issued injunctions to prevent litigants asserting their legal rights, when these were opposed to equity, in the Common Law Courts. Now, by the Judicature Act, 1873, the administration of law and equity is fused to this extent—that while all the Superior Courts have jurisdiction both in law and equity, yet actions founded purely on equitable rights should still be brought in the Chancery Division, and the Courts of Common Law (or, as they are now called, Courts of the

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[1] The last occasion when the Court of Chancery avowedly made new law was the case of *Tulk* v. *Moxhay* (1848), 11 Beav. 571, which established the doctrine of restrictive covenants.

King's Bench Division) are to recognize equitable defences or rights when they come incidentally before them in a lawsuit. (See *Ind, Coope & Co.* v. *Emmerson* (1887), 12 App. Cas. 300.)

Rise of Equity.—Originally the *Aula Regis*, or King in Council, was the supreme law Court of the realm. Besides administering the common law, however, the *Aula Regis* had a vague jurisdiction to suspend or amend or supplement it in cases where it denied a remedy to a person injured, or where its application would result in palpable injustice.[1] When the Common Law Courts grew out of the *Aula Regis*, this jurisdiction remained in the King, and it became customary to petition him where the Common Law Courts could not or would not do justice. In dealing with these petitions, the King was from the first assisted by his Chancellor. In Edward I.'s time it was directed by proclamation that all such petitions were to be presented through the Chancellor, and a proclamation of Edward III. definitely refers "all matters of grace" to the decision of the Chancellor. That great official was at this time always an ecclesiastic, and, as an ecclesiastic, he was usually more familiar with Canon law and religious ethics than with English law. As might be expected, then, he favoured the supersession of all common law rules which tended to the disadvantage of the Church, and he inclined to regard ethical principles, when these differed from those of English law, as superior to the latter in wisdom and equity. These two leanings gave rise to most of the differences in principle and in procedure which originally, at any rate, distinguished equity from the common law.

Ownership of Land and Goods.—The doctrines of the ancient common law of England as to property real and personal have been greatly altered by the operation of equity and the force of statute. Nevertheless, if we want thoroughly to understand the law as it now is, we must first learn what it was before these two agencies brought it to its present shape. The ancient common law is still the foundation on which the whole superstructure since raised by the Chancellors and Parliament has been built, and that superstructure was compelled to follow the lines of the foundation on which it rests.

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[1] Cf. the *imperium* with which the Roman prætor was clothed and which gave the effect of law to his edict during his year of office.

Now the most characteristic distinctions between property in land and property in goods at common law are these: (1) At common law the ownership of land is never absolute, while the ownership of goods is never anything but absolute. (2) At common law the whole ownership which the law permits over land may be divided among several persons entitled in succession; while the absolute ownership of goods cannot be cut up into successive interests.

Tenure of Land.—By the theory of English Law, the King is "sovereigne lord or lord paramount, either mediate or immediate, of all and every parcell of land within the realme." (Co. Litt. 65 a.) In other words, however great the interest of any English subject in any parcel of English land may be, he is still regarded not as an absolute owner but as merely a tenant or holder of his land from the Crown or from someone who himself holds from the Crown, in which the ultimate ownership of the land resides. There is no such ultimate ownership residing in the Crown as regards goods. This is commonly summed up by saying that land is, and goods are not, the subject of tenure.

At one time this doctrine of tenure was a matter of vast practical importance. It imposed obligations on the owner of an interest in land so heavy as to constitute it a real diminution of the right of ownership. These obligations have been almost entirely abolished, and the ultimate interest theoretically residing in the Crown is now only the ghost of a real interest long since passed away. But the former existence of these obligations and of this interest has deeply influenced the conception of ownership of land. Ownership of goods is regarded purely as a right; ownership of lands is still regarded as a duty as well as a right. Being a duty, the law has been most careful to see that there is always someone in existence to discharge it. (Gilb. Tenures, p. 18.) This, as we shall find, has profoundly affected the whole system of conveyancing. It has also caused the law to impose ownership of land on persons not desiring it. On the death intestate of an owner of goods, his next of kin are under no obligation to take over the ownership of his goods. On the death intestate of an owner of land, the ownership of it vests in his heir-at-law, whether the latter wishes it or not.[1] And it has imposed on the owner of land the necessity of remaining owner of it until another person has been found to undertake that duty. The owner of goods can abandon them by any act which shows he desires to remain owner no longer, as by throwing them away. But the owner of land must retain the ownership till someone else acquires it. (*Attorney-General* v. *Tod Heatley*, (1897) 1 Ch. 560.)

Estates in Land.—Not merely can there be nothing but partial or incomplete ownership in land, but there can subsist at one and the same time a multitude of partial interests in the same plot of land vested in or belonging to as many different persons, who will be entitled in succession to the possession and profits of the land. At common law there can be no such successive interests in goods. This is commonly summed up by saying that land is not merely the subject of tenure, but the subject of estates; goods are the subject of neither.

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[1] It is difficult to say how far this doctrine has been affected by sect. 1 of the Land Transfer Act, 1897, which provides that freehold land shall, on the owner's death, vest in the deceased's personal representatives. Probably, however, it is impliedly repealed, especially as by sect. 3 the heir has no title to the land until the administrator *conveys* it to him, and it is a general rule that you cannot convey property to any person against his will, though it might be contended that this rule does not apply where the grantee is under a legal duty to accept the grant.

A lease is only a contract for the use of land which remains the property of the lessor; otherwise another case of compulsory acceptance of ownership would arise under the bankruptcy law when the trustee repudiates a lease. (*See Powell* v. *Hemsley*, (1909) 2 Ch. 252, at p. 255.)

Land being in its nature indestructible, the ownership of it must have certainty of duration. The law therefore allowed it to be divided according to duration. But goods are in their nature destructible, and therefore the ownership of them can have no certainty of duration. The law accordingly did not permit it to be divided according to duration. The ownership of goods might be divided as far as their use was concerned, as, for example, a horse belonging to one person might be hired by another. But at common law a horse could not be given to one person for a year, and at the end of that year to another person absolutely. We shall see, however, how equity has, to a large extent, practically reversed the common law, and while theoretically leaving the doctrines of the latter untouched has allowed successive interests in goods to be created freely.

Title Deeds and Heirlooms.—Owing to the existence of limited interests in land, mere possession is not on a sale of land regarded (as it is in the case of a sale of goods) as sufficient evidence that the vendor is entitled to the land absolutely. Accordingly it is customary to preserve all the documents by which the ownership of land has been transferred from one person to another, in order to be able to prove, when necessary, the mode by which it became vested in its owner and the extent of his interest. These documents are called the title deeds to the land.

Title deeds to land (as far as ownership in them is recognized) are exceptions to the common law rule that no partial interests can subsist in chattels. Title deeds are looked upon by the law as "the sinews of the land." (Co. Litt. 6 a.) They pass with the ownership of the land (Vendor and Purchaser Act, 1874, s. 2, r. 5; *Williams and Duchess of Newcastle's Contract*, (1897) 2 Ch. 144), and where partial interests subsist in the land they equally subsist in the title deeds.[1]

Again, heirlooms are at common law goods in which partial interests may subsist. By heirlooms are meant chattels which, by special custom, go with the land or with a freehold office. "In some places," as Coke says (Co. Litt. 18 b), "chattels as heirlooms (as the best bed, table, pot, can, cart, and other dead chattels moveable) may go to the heire." Where this is the custom the same limited interests may subsist in the heirlooms as subsist in the land to which they are appendant. But heirlooms by special custom are now very rarely met with, and consist usually of such things as coat armour and tombstones. The most notable example of them is Crown jewels, which, by a special custom affecting the Crown, are held by each sovereign only for the term of his life. What are popularly known as heirlooms are jewels, pictures, or plate, settled in trust to accompany land. (*See Re Dayrell, Hastie* v. *Dayrell*, (1904) 2 Ch. 496.) The limited interests thus created in these are merely interests in equity.[2] At common law the whole ownership in them is vested in the trustees of the settlement.

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[1] Title deeds may be treated as chattels personal apart from the land to which they refer. Thus they may be given under a bill of sale (*see infra, p.* 226) as a security for a loan without in any way affecting the ownership of the land. (*Swanley Coal Co.* v. *Denton,* (1907) 2 K. B. 873.) Such a security is to be distinguished from a mortgage by deposit of title deeds, which gives the lender an equitable charge upon the land itself. (*See infra, p.* 221.)

[2] *See* Strahan's Conveyancing, Part VI., sect. 3.

SECTION I.

INTERESTS IN LAND.

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Origin of Tenure.—It would appear that, in Anglo-Saxon times, absolute or, as it is technically called, *allodial* ownership by individuals, or by groups of individuals, was the usual (though not the only) kind of ownership of land in England.[1] Upon the Norman Conquest, however, much land was forfeited to the Crown, and William in granting this and other Crown lands among his followers observed the custom which had grown up among the Teutonic tribes, who had lately overrun Western Europe. That custom was not to give the land absolutely, but to give it as a *fief* or *feud*—that is, to permit the follower to hold the land in return for services which he undertook to render to the King. William parcelled out most of the forfeited lands in this fashion among his barons and knights. They in their turn, with the consent of the Crown, parcelled out most of the lands so granted to them among their followers on condition that such followers should render them certain services. And the followers might pursue the same practice, and so on *ad infinitum*. This process was called "subinfeudation." In each case the person making the grant (grantor) was the "lord" of the person to whom the grant was made (grantee), and the latter was the "tenant" (or person holding) of the lord. The King was lord paramount. Those who held directly from him were tenants *in capite*. The tenant *in capite* was the immediate lord of those who held from him and the superior lord of those who held from his tenants. The lords between the Crown and the actual tenant of the land were called "mesne" lords. Each class owed services to their immediate lords, and the tenants *in capite* owed service to the Crown.[1] This system of tenures is what is known as the feudal system of land ownership.

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[1] This merely means that the feudal notion of tenure did not prevail. Individual ownership can hardly be said to have existed: at any rate, the vast bulk of the land was foc land, belonging to the community.

At first, this system applied only to the land vested in the Crown at the Conquest and granted out by the King. But gradually it was extended by the Courts to all the land in the realm, until now it has become an axiom of English law that all English land owned by a subject is held mediately or immediately from the Crown. Allodial ownership can be in the King alone. (2 Bl. Com. 104.) The same doctrine applies to land in Ireland; but some doubt exists whether allodial lands in the hands of a subject may not still exist in Scotland. Indeed, it has been affirmed that manses and glebes throughout Scotland are subjects of allodial ownership, and that the feudal system of tenure has never been introduced at all into the Orkneys. (Hargrave's note, Co. Litt. 65 a.)

Kinds of Tenure.—The land confiscated by the Conqueror and the early Plantagenets was almost entirely agricultural land, and this land was granted by them to their followers in two forms. To their greater barons it was granted in *honours*, to the lesser barons in *manors*. An honour consisted of a number of manors which by ancient usage were held as one estate by a great officer of the kingdom, who exercised over it not merely proprietary but political powers, and who derived his title from it;

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[1] The strict feudal practice was departed from when the Conqueror demanded the oath of fealty to himself from all tenants.

hence the expression "title of honour"[1]. A manor, on the other hand, was what might be called the agricultural (and political) unit of that age.[2] It consisted of a tract of land with a community upon it organised for its cultivation and for rendering the necessary military and other services. This community was composed of two classes—freemen and serfs attached to the soil or villeins regardant, as they were called in Norman French. The freemen, of whom the lord or grantee of the manor was the chief, were the rulers of the manor. They met together in the Court Baron of the Manor, where all dealings with the land of the manor were carried out and duly recorded in the books or roll of the manor. The other freemen of the manor were the tenants of the lord, but subject to the services they owed him they were his equals in law—judges of the court baron, as they were called. (*See* Appendix A.)

The two great classes, then, of the agricultural population were, roughly speaking, freemen and serfs or villeins. Tenures followed this division. "Free" or "frank" tenure was the tenure of the freeman who enjoyed equal legal rights with his lord. "Base" or "villein" tenure was the tenure of the serf who had no legal rights as against his lord. So completely was this difference of tenure based upon difference of status, that a grant to a serf by his lord of a holding in free tenure enfranchised the slave.[3] (Co. Litt. 138 a.)

Free tenure was divided into three classes according to the services incident to them:—Tenure in chivalry (such as knight-service and grand serjeanty), where the services were chiefly military and personal; Tenure in socage (such as free or common socage and petit serjeanty), where the services usually were fixed payments; and Tenure spiritual (such as frankalmoigne), where the services were religious. It is not worth our while to go further into the differences between these, since they are now matters of only antiquarian interest. By the Act for the Abolition of Military Tenures, 1660, which operated from 24 Feb. 1646 (new style), the date of a resolution passed by the Long Parliament for the same purpose, all free lay tenures are turned into free or common socage, and the incidents of tenure in chivalry and tenancy *in capite* in socage—which were of a very burdensome description—are abolished, save only the honorary services in grand serjeanty, and socage relief, which by the Statute of Wards and Reliefs (28 Ed. I. st. 1 (4), A.D. 1300) was fixed at a payment of one year's quit rent on the death of an owner in socage. And as to tenure spiritual, since the statute *Quia Emptores*, 1290 (*see infra, p.* 39), it can only be created by the Crown.

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[1] The lordship of Arundel is now said to be the only honour which carries with it the right to sit in the House of Lords.

[2] Cf. the Russian *Mir*. See *Russia and the New Democracy*, by the present writer, in the Law Quarterly Review, January, 1919.

[3] The last claim of villenage heard in Court was in 15 Jac. I. (1618). (*Pigg* v. *Caley*, Noy, 27.)

Villein tenure at first was scarcely a legal tenure at all, since it conferred no legal rights upon the tenant as against the lord. It arose out of the practice of lords of manors (*see* Appendix A.) of permitting villeins regardant of the manor to occupy certain lands in consideration of whatever services the lord chose to call upon them to render. The villein's sole title consisted of an entry to that effect upon the roll of the manor, and for a long time this entry only created a tenancy at the will of the lord. The villein, however, was rarely disturbed in his possession. Not only so, but it became customary for the lord to continue the tenancy from father to son and to demand from each holder only the same services. Gradually the Courts took cognizance of this custom, and from being a favour it became a right. The tenant then ceased to be called a tenant at will and became a copyholder—a tenant holding by copy of court roll of the manor, and owning, subject to certain fixed services rendered to the lord, a hereditary interest in the land granted. When this change had taken place villein tenure may be said to have become customary tenure. A copyholder's estate, however, is still a tenancy at will, except so far as it has been increased and made better by custom. (*Per* Rigby, L. J., *Western* v. *Bailey*, (1897) 1 Q. B. 86, at p. 91.)

Customary tenure is of two kinds, copyhold by custom of the manor and copyhold by custom of ancient demesne, sometimes called customary freehold.[1] The chief distinction between these is, that in the former the owner of the copyhold interest is expressed to hold it at the will of the lord of the manor, while in the latter these words are omitted. A further distinction is that the latter only occurs in lands which are stated in the Domesday Book to have been at the time of Edward the Confessor or William the Conqueror vested in the Crown as a provision for the support of its dignity. Of these then may be truly said what Lord Coke says of copyholds generally, that though meanly descended they come of an ancient house. (The Compleat Copyholder, s. 32.)

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[1] This, which has hitherto been the more generally accepted view, is dissented from by Cozens-Hardy, J., in the recent case of *Merttens* v. *Hill*, (1901) 1 Ch. 842. He there holds that a tenant of a manor of ancient demesne is a free tenant having the freehold of his land in him, and that the Court of Ancient Demesne corresponds not to the ordinary customary court—that is, the copyholders' court—of the ordinary manor, but to the Court Baron, or free tenants' court. There are, as in other manors, copyhold tenants, but the copyholders in a manor of ancient demesne are not, he points out, tenants of the manor, but tenants of the lord, and form the customary court of the manor. It is not clear from the judgment whether his lordship is speaking of what are called customary freeholders generally, or only of those in the manor of Rothley, Leicestershire. It is quite possible, of course, that the customary freeholders in that manor are real freeholders (if they can transfer their estates otherwise than by entry on the court roll of the manor, as his lordship finds they can, they undoubtedly are), while generally speaking tenants in manors of ancient demesne are not. In view of this, and of the high authority of Blackstone (1 Bl. Law Tracts, 103, 121), which was subsequently adopted by the Legislature (31 Geo. II. c. 14), in support of the view in the text, I have permitted the latter to remain unchanged. The question is not altogether an academic one, as Challis points out (Ch. on Real Prop. p. 31), and as this case itself shows.

Free and Customary Tenures.—Customary tenure does not subsist between the customary tenant and the Crown, but between the customary tenant and the lord of the manor who is himself the free tenant under the Crown. Customary tenure is thus a derivative or subordinate tenure. Free tenure applies to all the lands of the realm; but as to some lands a secondary tenure applies as between the free tenant and the actual holder of the lands, which tenure the Courts recognize as established not by the common law, strictly speaking, but by custom. And free tenure being the proper common law tenure, in all cases where there is doubt whether the tenure is free or customary, the law presumes it to be free till the contrary is shown.

The chief characteristics of customary tenure are, Firstly, The tenant who becomes entitled either by purchase or descent from the previous tenant has no legal interest in the land till he is admitted by the lord of the manor. Secondly, Upon admission, he is liable to certain customary payments to the lord. Thirdly, Save in manors where there is a custom to the contrary, the timber upon and the minerals in the land belong to the lord. And fourthly, the tenant cannot grant a lease of the land for more than a year without the lord's consent. Subject to these qualifications, customary ownership corresponds pretty generally to free ownership.

The importance of customary tenure has of late greatly declined owing to the enfranchising Acts now consolidated in the Copyhold Act, 1894, which have enabled copyholders to turn their tenure into free socage by buying out the interest of the lord of the manor. What we now say will apply only to lands in free tenure, unless copyholds are expressly included. A more particular description of customary tenure is given in Appendix A.

Free Socage.—All the land in the realm not vested in the Crown is, as we have seen, now held in socage tenure. Land so held, if the tenant has a heritable interest at common law in it, descends, on his death intestate, to the common law heir. This is the rule, but exceptions to it are made by local custom. Thus, by the custom of Kent, *gavelkind* lands descend, when there are more than one son, not to the eldest son exclusively (who is the common law heir), but to all the sons in equal portions (who together constitute the customary heir). (Rob. Gavel. 112.) The custom of Kent attaches other incidents to gavelkind lands which will be mentioned in their place, and though several private disgavelling Acts have been passed, the presumption of law still is that all lands in Kent are gavelkind till the contrary is shown. (Rob. Gav. 54.) Again, by the custom of certain ancient boroughs, land within them descends not to the eldest but to the youngest son. This custom is called *borough-english*, and is usually annexed to lands formerly held in burgage tenure, a special kind of socage the incidents of which (like those of petit serjeanty) are still recognized by the law. As a rule, however, these differences in descent and in other matters occasionally do not indicate a separate tenure, but are merely peculiar incidents attached by custom to land, subject otherwise to the general tenure of free socage.[1]

Incidents of Free Tenure.—As between tenants in fee simple and the Crown, most of the incidents of free tenure were abolished by the Military Tenures Act, 1660. Besides those arising out of petit serjeanty, the most important now remaining is *escheat*, that is, the reverter to the Crown as lord paramount of land held by a tenant in fee simple under it. This now usually arises through the death of the tenant without heirs and without a will. (*See infra, p.* 311.)

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[1] The difference between incidents arising from tenure and incidents attached by custom is this: the former change with the tenure, the latter do not—the maxim being that custom runs, not with the tenure, but with the land. Thus copyholds when enfranchised (*see* Appendix A.) become freeholds, and all the incidents peculiar to copyhold change simultaneously. But any peculiarity of descent attached to lands of a particular manor by local custom survives at common law the change in tenure, and continues to regulate the descent of the freehold. (Rob. Gav. 80.) By sect. 21 of the Copyright Act, this is not so when enfranchisement takes place under that Act.

As between tenants in fee simple and tenants holding under them in fee simple—a relationship now not often met with—besides escheat, a *quit rent*[1] (which now is usually of small value owing to the change in the value of money, and which may, by sect. 45 of the Conveyancing Act, 1881, be compulsorily redeemed by the tenant), *socage relief* of one year's quit rent payable on the death of the tenant and, if the land be parcel of a manor, *rights of common* on the waste of the manor are also usually incident. As between tenants in fee simple and tenants holding smaller interests under them there is no escheat, since the lord enters on the land as of his old estate on the determination, or end, of the smaller interest. What the other incidents of these smaller interests are, we shall see when we come to consider such interests.

Wherever there is tenure, *fealty*—*i.e.*, an oath of loyalty to the lord—is incident; but it now is never demanded. *Homage* was abolished by the Military Tenures Act, 1660.

Interests of Free Tenure.—Free tenure was, as we have seen, the tenure of freemen. As such, the conditions of the tenure had to be such as, according to the notions of the time, a freeman might honourably submit to. The services due under it could not be servile and uncertain in their nature, and interests given in it could not be held at the mere will and pleasure of the lord. The smallest interest that was considered suitable to the status of a freeman was an estate certain for life. This accordingly was and is the least interest that can be held in free tenure. Of course, there was no objection to a freeman accepting a larger estate. Accordingly, grants not merely to continue during his own life, but to continue as long as he had heirs, could be made in free tenure. These latter were called estates in fee. Estates for life and estates in fee were at first the only interests that could be held in free tenure.

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[1] Quit rents, whether freehold or copyhold, are barred by non-payment or acknowledgment for twelve years like ordinary rent-charges. (*Howitt* v. *Earl of Harington,* (1893) 2 Ch. 497.)

Estates in fee were of various kinds, of which the most important were estates in fee simple and estates in fee conditional. The former were estates limited to continue so long as the original grantees had heirs of any kind (*i.e.*, now roughly blood relations); the latter only so long as the original grantees had direct descendants to inherit them. On failure of descendants, conditional fees reverted to the grantor or his heirs. As long as fees were inalienable (*i.e.*, could not be transferred) such estates ran their natural course; but when the right to alienate became one of their legal incidents, the reverter to the lord became liable to defeat. The Courts then held that a fee conditional was a fee the condition of which was the birth to the grantee of a child who could inherit it, and that on the birth of such a child, this condition was fulfilled to the extent, at any rate, of enabling the grantee to alienate the estate free from the condition, that is, to alienate it in fee simple, and also to make it forfeitable in fee simple to the Crown on the tenant's conviction of treason. (Co. Litt. 19 a.) The effect of such an alienation or forfeiture was to defeat the reverter to the lord for ever.

To prevent this extinguishment of a valuable right, the great lords, of whom a large part of the land of the realm was held, passed the statute *De Donis Conditionalibus*, A.D. 1285), so called from the words with which it begins. This enacted that the condition of the grant in the case of a conditional fee should henceforth be strictly observed. Conditional fees in land were on this held inalienable, and from being owners of the full fee subject to a condition, tenants in fee conditional now became practically only life tenants, with life estates to the heirs of their body in succession. With this change in their character, a change took place in the name given to conditional fees. Henceforth they were called not conditional fees, but fees in tail or fees tail (from *tailler*, to cut), in allusion to the fact that the full inheritance had been cut down into a mutilated or truncated one. (2 Bl. Com. 112.)

There were now—and there have continued to be ever since—three estates in land of free tenure; two at common law (*fee simple* and *life estate*), and one statutory (*fee tail*). These, when they are held in free tenure, are commonly called freehold interests.[1]

Sub-section 1.

FREEHOLD INTERESTS.

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Heirs.—Of freehold interests in land, two, as we have seen, are heritable interests, and one is not. A heritable interest is merely an interest the duration or extent of which is marked out (or *limited*, as the technical expression is) by reference to the kind or class of heirs of the tenant who may succeed to it in case nothing happens to prevent its descent to them. It is important to remember, however, that though the estate is granted to the tenant and his heirs, the heirs take nothing under the grant.

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[1] Precisely similar interests subsist in copyholds. (*See* Appendix A.)

The words are merely *words of limitation*, that is, words used to indicate the extent of the estate the tenant takes —whether it is a fee tail or a fee simple. (*See infra, p.* 36.)

Kinds of Heirs.—The word *heirs*, when used in connection with the limitation of estates, is, roughly speaking, equivalent to blood relations. And heirs are divided according to their relationship to the person whose heirs they are. The primary division is between blood relations generally and descendants. The former are called *heirs* simply, or *heirs general*, the latter *heirs of the body*. Then heirs of the body are distinguished according as they are descendants generally, or descendants of a particular sex, or by a particular marriage. The first class are *heirs general of the body*, the second *heirs male or heirs female of the body*, the last *heirs of the body by his wife A.* or *by her husband B.*, or *heirs of their bodies begotten between them*. The last class, again, may be distinguished according to their sex. When heirs of the body are divided according to sex, those only are included who are not merely of that given sex, but who are also descended through that sex from the person whose heirs of the body they are. (Litt. s. 24; Co. Litt. 25 a.) Thus, heirs male of the body include only sons, the sons of sons, the sons of sons' sons, and so on. The son of a daughter is not the heir male of the body of his grandfather. It may be noted that the law does not permit heirs general to be divided according to sex, but only heirs of the body. (Litt. s. 31; Co. Litt. 27 a.)

All the kinds of relationship mentioned here must be legitimate relationship. Merely natural relationship is not recognized in law, at any rate for purposes of inheritance. That is why it is called natural (as opposed to legal) relationship. A bastard is in law *nullius filius*, the son of nobody. He has no relatives save his own descendants, and he can never claim as heir except as to them.[1]

Another point may just be mentioned. When it is said the heirs or heirs in tail in a grant include the classes of relatives mentioned, it is not meant that if the estate is allowed to descend the class in question will take it among them. The person who will take it—*the heir-at-law*, or *heir of the body*, as he is called—will be ascertained on the death of the owner by means of the canons of descent. (*See infra, p.* 319.) All that is meant is that the estate will not fail for want of heirs as long as any of that class exists, or at any rate can be ascertained to exist.

Heritable Estates.—Heritable estates or fees being estates limited to the grantees and their heirs, they are divided just as heirs are divided. The primary division is into *fee simple* estates, *i.e.*, estates limited to the grantee and his heirs general (that is, without qualification), and *fee tail* estates, *i.e.*, estates limited to a man and the heirs of his body. Again, there are as many kinds of fee tail estates as there are kinds of heirs of the body. There are estates in *tail general*—"to A. and the heirs of his body"; in *tail male*—"to A. and the heirs male of his body"; in *tail female*—"to A. and the heirs female of his body";[2] in *tail special*—"to A. and the heirs of his body by his wife B.," or "to A. and his wife B. and the heirs of their bodies between them begotten"; in *male tail special*—"to A. and the heirs male of his body by his wife B."; and in *female tail special*—"to A. and the heirs female of his body by his wife B.," &c.

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[1] Under the old law of descent a bastard could not be heir even of own issue, as the rule then was that inheritances could not ascend lineally. This was altered by the Inheritance Act, 1833, s. 6.

[2] Limitations in tail female are for obvious reasons so rare in practice that some very learned writers have doubted whether they are legal. (*See* Co. Litt. 25 a, note 1.) But this doubt seems to be unfounded. (*See per* Lord Blackburn, *Earl of Zetland* v. *Lord Advocate,* 3 App. Cas. 505, at p. 523.)

Words of Inheritance.—These words *heirs* and *heirs of the body* are the apt words for creating an estate of inheritance at common law, and formerly in grants by deed, though not in gifts by will, an estate of inheritance could not be transferred without them. To this day a grant by deed to A. without more will give A. only a life estate. (*In re Ford & Ferguson's Contract*, (1906) 1 Ir. R. 607.) But by section 51 of the Conveyancing Act, 1881, the words *heirs* or *heirs of the body* are no longer absolutely necessary. The estate intended to be conveyed may now be described as an estate in *fee simple* or *in tail*, as the case may be. These words are, however, only alternative technical words in lieu of the words "and his heirs" or "and the heirs of his body," and are fully as technical as the older expressions. Thus it has been held that a conveyance to A. "in fee"—not in "fee simple"—will not be good to carry to A. an estate of inheritance. (*In re Ethel and Mitchells and Butler's Contract*, (1901) 1 Ch. 945.)[1]

In grants in spiritual tenure a fee simple can be conveyed without words of inheritance, and such is the case in grants to corporations aggregate in all cases. (*See Part VII.*) But in grants to corporations sole the words *his successors* must take the place of *his heirs*, save in the case of grants to the sovereign, when no words of succession are necessary. (2 Bl. Com. 108; Under. & Stra. on Wills, p. 197.)

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[1] These common law rules of limitation do not apply to equitable estates. A fee simple, or a fee tail, may be created by deed or writing in the equitable estate in land by any words which indicate clearly that it was the intention of the grantor to grant such estate. (*See In re Tringham, Tringham* v. *Greenhill*, (1904) 2 Ch. 487; *In re Gillies' Settlement*, (1917) 2 Ch. 205; cf. the rule applicable to devises: Strahan's Law of Wills, p. 18.)

(a.) *Estates in Fee Simple.*

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Estates in Fee Simple.—An estate in fee simple is the largest interest in land which can be owned by any subject. When it is in possession—that is, when there is no smaller freehold interest preceding it, or when its owner is not deprived of the use of the land by the subsistence therein of a chattel interest belonging to somebody else—it amounts, for all practical purposes, to absolute ownership. Its owner can use the land as he likes, and dispose of the right to use it as he likes, and the right is unlimited in duration; or, in the ordinary phrase, the owner holds the land "to himself, his heirs and assigns for ever." The only qualification of the ownership lies usually in the lordship residing in the Crown, which, as we have already seen, is now of a very shadowy and unsubstantial character.

No Reversion on Fees Simple.—Though other smaller freehold interests may precede an estate in fee simple, no interest of any kind can at common law follow it. (*Willion* v. *Berkeley*, Plowd. 223.) In other words there can be no *reversion* (*see infra, p.* 155) on a fee simple. This characteristic results from a fee simple estate being regarded by the law as an estate to last for ever, and it is a characteristic peculiar to fees simple. All other interests in land, freehold or chattel, are in their nature terminable, and therefore any number of them cannot absorb the full ownership, which is everlasting, at any rate in contemplation of law. Accordingly, however many smaller estates may be limited in a parcel of land, there must still be a reversion over and above them all, and that reversion must be a fee simple, which is the only estate which is everlasting, and which is able, therefore, to absorb the whole ownership.

Determinable Fees.—At one time, however, it was possible at common law to qualify fees simple, so that while there was no reversion on them—that is, no estate to follow them—there might nevertheless be a possibility of reverter—that is, a chance of their returning to the grantor. Thus, an estate might be granted to "A. and his heirs, lords of the Manor of Dale." (Co. Litt. 27 a; 2 Bl. Com. 109.) Here the limitation to "A. and his heirs" creates a fee simple. The collateral limitation, "lords of the Manor of Dale," restricted the enjoyment of the grant by A. and his heirs to the period they continue to be lords of that manor. When they ceased to be such lords, the fee simple determined, and the lands reverted to the grantor or his heirs. This was called a *fee determinable*. Here the owner had all the rights of an owner in fee simple absolute. He could use the land as he liked, and dispose of it as he liked, subject always to the condition that it should determine on his or his heirs ceasing to be lords of the Manor of Dale—an event which, of course, might never happen.

For a long time it was a moot point whether a condition such as this—a condition, that is, which might continue annexed to the fee simple for ever—could still be attached to an estate in fee simple. Lately the question came before the Court, when it was held that a condition upon the fulfilment of which no limitation as to time was placed was bad, as being contrary to the rule against perpetuities. (*In re Trustees of Hollis' Hospital and Hague's Contract*, (1899) 2 Ch. 540; cf. *Re Blunt's Trusts, Wigan* v. *Clinch*, (1904) 2 Ch. 767; and *see infra, p.* 185.) Accordingly a fee simple granted subject to a perpetual or common law condition, as it is called, is now no longer a determinable fee but an ordinary fee simple, since the condition is void and of no effect.

Determinable Fees and Subsequent Limitations.—While fees simple can be no longer made subject to common law conditions, still determinable fees may yet be granted provided the determinary event is one which, if it occur at all, must by the terms of the grant occur during a life or lives in being at the date of the grant or within twenty-one years after the dropping of these lives. A determinable fee of this kind is, however, created on principles established by the Court of Chancery, and when so created it differs from a common law determinable fee in this respect: that though there is no reversion upon it, yet nevertheless future estates may be limited to arise on its determination in substitution for it. (*See infra, pp.* 166, 174.) No limitation could follow a determinable fee at common law.

The event which is to determine a determinable fee must be an event which may never happen. If it be an event which must happen some time or other, then the estate is not one which, in contemplation of law, can last for ever, and therefore it cannot be a fee simple of any sort. Thus an estate limited to A. and his heirs until A. shall marry is a good determinable fee, since A. may never marry, and then his fee will never determine; but an estate limited to A. and his heirs until the year 2019 is not a freehold interest at all, but merely a lease for a hundred years.[1]

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[1] It may be well to point out the difference between a determinable and a base fee at common law. A determinable fee is (as appears above) a fee descendible to the heirs general on which there is no reversion, but merely a possibility of reverter. (Plowd. 557.) A base fee is a fee descendible to the heirs general on which there is a reversion in fee simple. Determinable fee arises by original limitation. Base fees arise through the transfer of estates in fee tail. (*See p.* 48, *infra.*) For a list of base fees, see Challis on Real Property, Chap. 22. Blackstone uses the term base fee to describe what is called above a fee determinable. (2 Bl. Com. 108.)

Lordship over Fees Simple.—No reversion, as we have seen, can subsist over an estate in fee simple; neither, as a rule, can any lordship save that residing in the Crown. At one time this was different. When fees simple first became alienable, the rule was that if a tenant transferred by a single conveyance all the lands he held under any grant, the transfer might so operate that the new tenant held the lands from the lord of whom the old tenant held, and on the same services as the old tenant, who thereupon ceased to have any interest in the land. If, on the other hand, the old tenant transferred part of the land only, or transferred it all in parcels, then the new tenant or tenants must have held not of the lord of the old tenant but of the old tenant himself, who thereupon became a mesne lord seised of the land in service[1] (as the technical expression was), while his lord became the superior lord of the new tenants. This arose from the doctrine that services reserved on a grant could not be divided. This practice of *subinfeudation*, as it was called, worked, in some way or other not very clear now—since the superior lord could, notwithstanding the subinfeudation, distrain on the whole land for the services due to him by the tenant seised in service (2 Inst. 65)—to the prejudice of the superior lord; and in consequence, after some ineffectual attempts to check it (see 9 Hen. III. c. 32), an Act of Parliament was passed to stop subinfeudation altogether. This Act was the statute *Quia Emptores* (18 Ed. I. c. 1, A.D. 1290), so called, like the statute *De Donis Conditionalibus*, from the words with which it begins. It enacted that while every tenant in fee simple might freely alienate his land in fee simple, either in whole or in part, yet the new tenant or tenants should not hold of him as their lord, but from his lord by the same services by which he had held, which services, where the land was alienated partially or in parcels, were to be divided. This has continued to be the law ever since, and, consequently, any private lordship over lands in fee simple now subsisting must have been created either before the passing of this statute (A.D. 1290) or under some royal charter (affirmed by Act of Parliament) granted since that date. (*Delacherois* v. *Delacherois*, 11 H. L. C. 62.)[1] In the absence of evidence to prove a private lordship—which evidence is rarely forthcoming now—the lordship is presumed to reside in the Crown. (*Doe* v. *Redfern*, 12 East, 96.)

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[1] When a freeholder was in actual possession of the land he was said to be seised of it *in his demesne*. (*See* P. & M. Hist. Eng. Law, Vol. I. pp. 211, 219.)

The statute *Quia Emptores* did not apply to tenants *in capite*. These could not alienate without the consent of the Crown, and the Crown exacted a fine or fee for such consent. (1 Edw. III. c. 12.) Fines on alienation were, like other feudal exactions, abolished by the Ministry Tenures Act, 1660.

Fee Farm Grants.—The relation of lord and tenant is what is meant by tenure. The effect, therefore, of the statute *Quia Emptores* was to abolish henceforth tenure as between the grantor and grantee of estates in fee simple where the grantor was a subject. Rent is an incident of tenure—a service resulting from the relation of lord and tenant. Accordingly, after the statute *Quia Emptores*, no rent properly so called—that is, *rent service*, for which the common law gave a right to distrain (*see infra*, *p*. 99) on the land subject to it—could be reserved by the grantor on a grant in fee simple. When a rent was reserved it was only a *rent seck*, or dry rent—so called because the common law gave no remedy by distress for recovering it. To secure its payment a power of distress had to be specially given to the owner in the instrument reserving the rent. When such a power was given the rent was called not a rent seck, but a *rent charge*.

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[1] It is doubtful whether the Crown cannot grant by charter, without the sanction of Parliament, authority to a subject to create a manor or private lordship. (*See* Co. Litt. 98 b.)

As grants in fee simple, in which part of the consideration—or payment—for the land took the form of a rent reserved to the grantor, became more usual, this state of the law caused inconvenience, and in George II.'s time an Act (4 Geo. II. c. 28) was passed making a power of distress incident to a rent seck. And now, by sect. 44 of the Conveyancing Act of 1881, as far as rents created after 1st January, 1882, are concerned, the owner or grantee of a rent charged on a fee simple has the following remedies against the land subject to it: (a) if unpaid for twenty-one days after becoming due, distress; (b) if unpaid for forty days, entry and possession till payment of arrears; (c) if unpaid for forty days, power to demise to a trustee for a term of years on trust to raise the arrears and costs by way of mortgage, sale, or demise of such term. (*See Blackburne* v. *Hope-Edwards*, (1901) 1 Ch. 419.)

Grants in fee simple with a rent reserved to the grantor are now called fee farm grants. They are very common in Manchester and throughout the greater part of Lancashire, where they constitute the favourite form of building lease.

Fee Farm Grants in Ireland.—Fee farm grants are also very common in Ireland. In that country, however, such grants do for the most part give rise to the relationship of landlord and tenant between the grantor and grantee, and consequently entitle the grantor to the ordinary landlord's remedies (particularly distress and ejectment) for the recovery of the rent reserved by the grant. (*See Christie* v. *Peacock*, 30 L. R. Ir. 646.) There are three classes of cases in which the grant will give rise to such relationship or have such effects:—

(1) Many patents from the Crown, during the sixteenth and seventeenth centuries, giving lands to persons to hold as tenants in fee simple from the Crown, contained a licence empowering such persons to make sub-grants in fee, notwithstanding the statute of *Quia Emptores*. Fee farm grants made by persons having such a licence would

then, apparently, notwithstanding the statute, create a tenure between the grantee and grantor. (*Verschoyle* v. *Perkins*, 13 Ir. Eq. R. 72.)

(2) A very common form of lease in Ireland, during the later part of the eighteenth and earlier part of the nineteenth century, was a lease for the lives of specified persons, in which there was often contained a covenant by the lessor for perpetual renewal—*i.e.*, a covenant that, so often as any of the lives dropped, he would at the request of, and on certain payments (called renewal fines) being made by the lessee, grant a renewal of the lease for new lives. Such leases, although of course involving tenure between lessor and lessee, gave rise to a freehold interest, and an interest which was virtually perpetual, if there were such a covenant for renewal as has just been described. In 1849, a statute called the Renewable Leasehold Conversion Act, enabled either party to such a perpetually renewable lease to obtain a fee farm grant in substitution therefor; and sects. 20 and 21 gave to the grantor in such a grant all the remedies, including distress and ejectment, for the recovery of the rent reserved therein, which were applicable to the recovery of a rent-service reserved in a common law lease. The result is that any fee farm grant made since 1849, if it is what is commonly called a *conversion grant*, does practically create the relationship of landlord and tenant between the parties, so far as the remedies for the rent are concerned.

(3) Any fee farm grant made since 1st January, 1861, does, by virtue of sect. 3 of the Landlord and Tenant (Ireland) Act, 1860, create the relationship of landlord and tenant between the parties thereto. The words of that section, declaring that the relation "shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent," are wide enough to include fee farm grants. The section, however, is not retrospective

(*Chute* v. *Busteed*, 16 Ir. C. L. R. 222), nor does it apply to grants made under the Renewable Leasehold Conversion Act, nor to renewals made after 1861 in pursuance of covenants for renewal in leases made before that date. The tenant under a fee farm grant (unlike the lessee in a renewable lease) is not impeachable for waste, except fraudulent or malicious waste. (Sect. 25.)

A lease for lives renewable for ever, if made for the first time since the passing of the Renewable Leasehold Conversion Act, is by sect. 37 of that Act to operate as a fee farm grant if the lessor is capable of making such a grant, and any reservation of fines on renewal is to be deemed void. The tenant in fee farm has, like the tenant in fee simple, a power of free alienation, and any covenant in a fee farm grant restraining alienation is void as being "repugnant to the nature of the estate." (*Lunham's Estate*, Ir. R. 5 Eq. 170.) This, however, does not apply to the case of a tenant holding under a fee farm *conversion* grant;[1] for it has been decided that the effect of the express words of the Renewable Leasehold Conversion Act is to validate the incorporation in such a grant of provisions in the renewable lease making an increased penal rent payable on alienation to persons outside a certain class. (*In re McNaul's Estate*, (1902) 1 Ir. R. 114.)

It may be noted that an Irish fee farm grant is usually drawn in a form like that of a lease, and does not usually *charge* the land with payment of the rent.

Alienation of Fees Simple.—The power or right of voluntary and free alienation *inter vivos* has, ever since the statute *Quia Emptores*, been an inseparable incident of an estate in fee simple. The right of alienation by will was, as we shall see, first recognized by statutes in Henry VIII.'s reign (32 Hen. VIII. c. 1, and 34 & 35

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[1] And see sect. 70 of 3 Edw. VII. c. 17, making all covenants in any lease or fee farm grant prohibiting alienation void for the purpose of a sale under the Land Purchase Acts.

Hen. VIII. c. 5; *see p.* 170, *infra*), and fully acquired through the Military Tenures Act, 1660, already referred to.

Liability of Fees Simple for Debts.—The liability of a fee simple estate to be taken from its owner and used for the payment of his debts did not attach fully to fees simple till a comparatively recent date.

The estate was, so early as Edward I.'s time, made partially liable for its owner's debts for which judgment had been obtained during his lifetime. By the Statute of Westminster the Second (13 Edw. I. c. 18), a creditor could, under a writ of *elegit*, obtain possession of a half of the debtor's lands, and could retain them till the judgment debt was paid, or was realized out of the rents and profits. The statute applied only to judgments of the Courts of Common Law, as opposed to Courts of Equity; but now by the Judgments Act, 1838, s. 11, the writ of *elegit* is extended to all the debtor's lands and to all judgments of the Supreme Court. And, by sect. 4, once the land has been actually delivered in execution the creditor may obtain an order for its sale. Judgments of inferior courts, to be made effectual against land, must be removed to the Supreme Court.

Formerly judgments attached as an incumbrance upon lands. By Judgments Act, 1864, s. 1, no judgment entered after the passing of that Act—29th July, 1864—was to affect land until it was actually delivered in execution by virtue of a writ or other lawful authority. This enactment is repealed by sect. 5 of the Land Charges Act, 1900. By sect. 5 of the Land Charges Registration and Searches Act, 1888, every writ or order affecting land may, upon its issue, be registered at the Office of Land Registry in the name of the person whose land is affected by it, which registration is to lapse if not renewed every five years. And by sect. 6 of the same Act, every such writ or order, and every delivery in execution or other proceedings taken in pursuance of any such writ or order or in obedience thereto, shall be void as against a purchaser for value of the land, unless the writ or order is for the time being registered under sect. 5. Lastly, by the Land Charges Act, 1900, a judgment, whether obtained before or after the commencement of the Act (1st July, 1901), shall not operate as a charge on land, or any interest in land, or on the unpaid purchase-money for any land, unless or until a writ or order for the purpose of enforcing it is registered under the Land Charges Registration Act, 1888. (*See Lord Ashburton* v. *Nocton*, (1915) 1 Ch. 274.) And by sect. 6 Crown debts, which under the earlier Acts were charges upon the land without registration, require now to be registered like ordinary judgment debts.[1] By the Judgments Extension Act, 1868, judgments obtained in the Supreme Court, and in the superior Courts in Ireland and Scotland, are made respectively effectual in other parts of the United Kingdom.

A debtor's land has always, since bankruptcy was recognized by the law, been liable for the payment of his debts on his bankruptcy. On that event his lands (like his goods) vest in his trustee in bankruptcy, who realizes them and distributes the proceeds among the creditors. And a very convenient mode of enforcing judgment against a debtor who possesses land is to take proceedings against him in bankruptcy—especially if you know he is undoubtedly solvent.

So much for the liability of fees simple for the debts of their owner during his life. If, however, judgment were not recovered during his life, then, until recently, the fee simple lands of a debtor were liable in the hands of his heir or devisee only for debts due to the Crown, and debts due to private persons by bond, in which his heirs were expressly bound. These latter were called specialty debts, and the land liable to them was called legal assets for their payment. If the debtor devised his land for the payment of his debts, it was called equitable assets, and was divided equally between all his creditors. After various modifications of this rule, at last, by 3 & 4 Will. IV. c. 104, land was made assets for the payment of all the debts of a deceased owner, though specialty debts were still to be paid before ordinary debts. By Hinde Palmer's Act, 1869, the priority of specialty creditors is abolished as to all persons dying on or after 1st January, 1870. (*In re Samson, Robbins* v. *Alexander*, (1906) 2 Ch. 584.) Then, by the Judicature Act, 1875, s. 10, in the administration by the Court of the assets of any person who may die after the commencement of the Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules are to prevail as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt. (*In re Leng, Tarn* v. *Emmerson*, (1895) 1 Ch. 652; *In re Whitaker*, (1904) 1 Ch. 299.) It will be observed that when the administration is by the Chancery Division of the High Court the rules of bankruptcy apply only as regards rights of secured and unsecured creditors, and as to debts and liabilities provable; but under sect. 130 of the Bankruptcy Act, 1914, where the estate is insolvent, a creditor may present a petition to the Court of Bankruptcy, or without such petition the Chancery Division, where it is administering the estate, may transfer the administration to the Court of Bankruptcy, and in either case the estate will be wound up as if the deceased were alive and adjudicated bankrupt. (*In re Hay*, (1915) 2 Ch. 198; and *see infra, p*. 303.) The only differences are (1) that proper funeral and testamentary expenses will be paid in priority to all other debts, and (2) that the bankruptcy rules as to property within the bankrupt's order and disposition, fraudulent preferences and voluntary settlements, do not apply. (*Hasluck* v. *Clarke*, (1899) 1 Q. B. 699.) Finally, by sect. 2 (3) of the Land Transfer Act, 1897, in the administration of the assets of a person dying after the commencement of that Act (1st January, 1898), his real estate shall vest in his personal representatives and be administered in the same manner, subject to the same liabilities for debt, cost and expenses, and with the same incidents, as if it were personal estate. This Act does not apply to Ireland.

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[1] It may be noted that these Acts do not apply to Ireland, where the system of judgment mortgages prevails. (*See* Appendix D.)

(b.) *Estates in Fee Tail.*

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Estates in Fee Tail.—Estates in fee tail, as we have seen, arose out of the old conditional fees. (*Supra*, *p.* 31.) The object of the statute *De Donis Conditionalibus* was simply to preserve to the lord his chance of getting back the land on the natural determination of the conditional fee granted by him. The effect was, however, much more extensive. In the first place, by making the estate necessarily come to an end on failure of the heirs of the body of the grantee, the statute, as the Courts held, had reduced it to a smaller estate than the old conditional fee, which was merely a fee simple subject to a condition. Accordingly, instead of a possibility of reverter, which was all that remained in the grantor after granting a conditional fee (*Marquis of Westminster's Case*, 3 Rep. at p. 36), there remained in the grantor of a fee tail a reversion in fee simple which could be limited out in estates to come into enjoyment on the determination of the fee tail.[1] In the second place, by making it impossible for the grantee to *bar his issue* as it is called—that is, to prevent the heir of his body from becoming entitled to claim the estate on his death—the statute practically changed the grantee's interest from a fee into a life estate.[2] It is true, if a tenant in tail alienated his estate, the grantee did not take merely a life interest: he took a base fee—that is, an estate to him and his heirs which must determine when the heirs of the body of the alienating tenant in tail failed. But that base fee could, at any time after the decease of such tenant in tail, be put an end to by the entry of the heir of his body, *i.e.*, by the heir in tail taking or obtaining by an action possession of the land. And although, as we shall see, a tenant in tail can, by observing certain forms, now bar his issue and also the reversion of the grantor, and turn his estate into a fee simple (or, as the phrase is, *bar the entail*); yet if these forms are not observed his conveyance will still only transfer a base fee determinable after his decease by entry of his heir of the body.

Alienation of Fees Tail by Action.—The statute *De Donis Conditionalibus* having produced results not anticipated and not desirable, many attempts were made in

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[1] The statute *De Donis* applies only to tenements. Accordingly, limitations to the grantee and the heirs of his body of hereditaments which are not tenements—such as annuities not connected with land—create conditional fees still. And similar limitations of copyholds in manors where there is no custom to entail also do so. In both these cases the grantee, on the birth of heritable issue, is entitled to convey his interest in fee simple. And there is no reversion, but merely a possibility of reverter. in the grantor.

[2] An estate in fee tail was not liable to forfeiture on the conviction of the tenant in tail of treason, being in this respect different again from the old conditional fee, which was liable to forfeiture as soon as the tenant had issue born who could inherit. (*See supra, p.* 31.) Fees tail were made liable to forfeiture for treason by 26 Hen. VIII. c. 13..

Parliament to repeal it, but these all failed through the opposition of the great lords. What, however, Parliament would not sanction, the Courts accomplished by means of collusive actions.[1] These were of two kinds. The minor kind was what was called a fine levied with proclamations —a proceeding expressly recognized by Parliament in the Statutes of Fines, 1488 and 1540. This was a collusive action, which was settled with the consent of the Court in favour of the demandant,[2] who was the grantee to whom the estate was to be transferred. The second and more effectual kind was what was called a common recovery. This was a collusive action carried fully through to judgment for the demandant.

The old learning with regard to fines and recoveries is not of sufficient importance now to justify its introduction in an elementary work. It will be sufficient for our purposes to point out two differences between the two processes, as these constitute the basis of the law at present. In the first place, a fine could be levied by any tenant in tail whether his estate was in possession or was preceded by a life estate in possession, that is was what is called a fee tail *in remainder or reversion* (*see infra, p.* 157). A recovery, on the other hand, could be suffered only either by a tenant in tail in possession, or by a tenant in tail in remainder or reversion with the consent of the owner of the preceding life estate. Secondly, unless the tenant in tail owned the fee simple in remainder on the fee tail,[3] a fine barred only the issue of the tenant in tail who levied it, creating therefore merely a base fee. A recovery, on the other hand, barred not only the issue of the tenant in tail who suffered it, but also all other interests following the estate tail, creating therefore a fee simple. But neither a fine nor a recovery barred the reversion when that was in the Crown (as to fines, 32 Hen. VIII. c. 36, s. 36; as to recoveries, 34 & 35 Hen. VIII. c. 20), where the estate tail was granted by the Crown for services rendered to it. (*Perkins* v. *Sewell*, 1 Bla. 654; *Robinson* v. *Gifford*, (1903) 1 Ch. 865.)

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[1] As to a third mode of barring entails, namely, by warranty, *see* Strahan's Convey., p. 72, n. Barring by warranty was abolished by sect. 14 of the Fines and Recoveries Act, 1833.

[2] In real actions the proper description of the parties was demandant and tenant. Real actions are now abolished, and so the terms plaintiff and defendant, which formerly applied to parties in personal actions only, apply in all common law actions.

[3] A fine operated to bar the privies and heirs of the tenant levying it—*i.e.*, all parties claiming through him either by assignment or descent. If he owned not merely the fee tail, but also the fee simple in remainder on it, the whole ownership of the land was in him, and nobody could claim any interest in it except as his privies or heirs. (*See* Co. Litt. 121 a (note).)

The legality of alienation by common recovery seems to have been first judicially admitted in *Taltarum's Case*, A.D. 1473 (M. 12 Ed. IV. pl. 25 f., 19 a). In *Mary Portington's Case* (10 Rep. 35) it was held that a condition of forfeiture (*see infra, p.* 90) of an estate tail upon the tenant's doing or concurring in any proceeding to break the entail was bad. Since then the liability to be barred has always been considered to be an inseparable incident of estates in fee tail.

Alienation of Fees Tail by Deed.—The whole system of fines and recoveries was swept away in 1883 by the Fines and Recoveries Act. (3 & 4 Will. IV. c. 74; Irish Act, 4 & 5 Will. IV. c. 92.) Under that statute a tenant in tail, whether his estate is "in possession, remainder, contingency or otherwise," can alienate it or any lesser estate[1] by a deed executed by the tenant in tail and enrolled within six months of its execution (sect. 15; Irish Act, sect. 12) in the Central Office of the Supreme Court. (R. S. C. Ord. LXI. r. 9.) This disentailing assurance is simply an ordinary deed of grant, except that it declares the grant to be made "discharged from all estates in tail of the grantor at law or in equity."[2] If the assurance fails to take effect, as, for instance, by the grantee (where the grant is to his own use) disclaiming, *i.e.*, declining to accept the estate, the assurance is void, and the fee tail remains unaffected by it. (*Peacock* v. *Eastland*, L. R. 10 Eq. 17.) And further, the statute applies only to deeds actually executed, not to contracts to execute deeds. Accordingly if a tenant in tail contracts to disentail and sell his land, and dies before the deed is executed, the contract becomes void. (*Bankes* v. *Small*, 36 Ch. D. 716.) It would seem, however, that if he executes the disentailing assurance before his death it may be enrolled, and even the consent of the protector may be given by re-executing the assurance, after the death, provided it is within the six months from execution allowed by the Act. (*Whitmore-Searle* v. *Whitmore-Searle*, (1907) 2 Ch. 332.) Where there is no protector the tenant in tail is entitled to bar without any consent. (*In re Blandy Jenkins' Estate*, (1917) 1 Ch. 46.)

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[1] He can also mortgage it by deed enrolled. (Sect. 21.)

[2] As to rectifying disentailing deeds, see *Meeking* v. *Meeking*, (1917) 1 Ch. 77; cf. *In re Ottley's Settlement*, (1910) 1 Ir. R. 1.

When the tenant in tail does not wish to sell the settled lands, but wants merely to change his estate in them from a fee tail into a fee simple, he grants the lands to another person and his heirs "discharged from all estates in tail of the grantor in law or equity" to the use of the grantor and his heirs. The effect of such a conveyance is that the grantee takes no estate in the lands granted, but merely acts as a medium or "conduit pipe" to return them to the grantor in fee simple.

Operation of Disentailing Deeds.—Two differences have been pointed out between fines and recoveries. Both of these are substantially embodied in the new law as to disentailing deeds. Under it, a tenant in tail in possession, or a tenant in tail not in possession but entitled to the reversion or remainder expectant on his fee tail, can, at his own will, bar both his issue and all succeeding interests, and so turn his estate into a fee simple. (Sect. 34.) On the other hand, a tenant in tail neither in possession nor entitled to the reversion on his fee tail, can, at his own will, bar only his own issue, and so create a base fee, *i.e.*, a fee to the grantee and his heirs general, which will determine as soon as the grantor and the heirs of his body fail. If he desires to turn his estate into a fee simple, he must obtain the consent of the "protector of the settlement." (Sects. 40, 42.) The office of protector of the settlement may be vested in any number of persons not exceeding three appointed to be protectors by the instrument creating the estate tail. If two or more persons are so appointed, then on the death of one the office survives to the other or others. (*Bell* v. *Holtby*, L. R. 15 Eq. 179.) If no protector be appointed by the instrument, then the office belongs to the owner of the first estate of freehold in possession in the land under the same settlement as the fee tail, provided that the owner is not merely a tenant holding at a rent, or a trustee (*see In re Blandy Jenkins' Estate*, (1917) 1 Ch. 46), or a tenant in dower, or is not expressly excluded by the grantor. (Sect. 22.)[1] In the last case, if no protector is appointed, and in all cases if the protector is convicted of treason or felony,[2] or cannot be ascertained, the Court of Chancery is protector; or if the protector is a lunatic, the Court in Lunacy acts in his stead. (Sect. 33.) If a protector or protectors are appointed, but die or disclaim the office, the owner of the first freehold in possession becomes protector. (Sect. 32.) The office of protector is personal, and therefore it continues even though the protector has alienated the life estate which made him protector. (Sect. 22.)

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[1] When the legal estate is held in trust, the *cestui que trust* of the first equitable freehold is protector. (*In re Dudson's Contract,* 8 Ch. D. 628.) Now a married woman is entitled to be protector (Married Women's Property Act, 1907, s. 3). But the heir taking the first freehold by descent is not the protector, even where he is entitled to the rents and profits of the settled land. (*In re Hughes and London & North Western Railway,* (1906) 2 Ch. 642.)

[2] Where the tenant in tail is a convicted felon he, and not his administrator, under the Forfeiture Act, 1870, is entitled to bar the entail. (*In re Gaskell and Walter's Contract,* (1906) 2 Ch. 1.)

As we have seen, a tenant in tail who alienates without observing the requirements of the statute, as, for instance, if he does not enrol the disentailing assurance within six months of its execution (sect. 41), and a tenant in tail who alienates even observing such requirements, but without the consent of the protector, where the consent of the protector is made necessary to bar the remainder, conveys only a base fee in the settled lands. This base fee, however, will, where the deed was not enrolled, become a fee simple, if the grantee of it is or becomes the owner of the reversion in fee simple immediately following the base fee, and, where the consent was not given, the base fee can subsequently be enlarged into a fee simple by the original tenant in tail with the consent of the protector (sects. 35 and 39), or, if the tenant in tail be bankrupt, by the judge in bankruptcy with similar consent if there be any protector. (*See* Bankruptcy Act, 1914, s. 55 (5).) And by the Real Property Limitation Act, 1874, s. 6, when a person is in possession of a base fee for twelve years after the original tenant in tail might have barred the remainders without the consent of anyone, the base fee is to become a fee simple.

Finally, the provisions by which a tenant in tail was prohibited from barring the reversion by fine or recovery when the estate tail had been granted by the Crown for services to it, and the reversion was in the Crown, apply equally to barring by a deed under the Act. (Sect. 18.)

An Unbarrable Fee Tail.—When land is conveyed in special tail on the death without issue of the party on whose body the heirs were to be begotten, all possibility of issue capable of inheriting the estate is gone.[1] The tenant in tail then is called "tenant in tail after possibility of issue extinct," or more shortly, "tenant in tail after possibility," and such a tenant in tail is unable to bar the entail.[1] (Fines and Recoveries Act, 1833, s. 18.) He is regarded for most purposes merely as a tenant for life, save that he is not liable for waste. (*See Williams* v. *Williams*, 15 Ves. 419, and *p.* 62, *infra.*) It would seem, however, that when he commits waste by cutting down timber, the property in the timber so cut down is not in him, but in the first person entitled to an estate of inheritance in the land. (2 Bl. Com. 125.) And if he assigns his estate his assignee is merely a tenant *pur autre vie* and liable for waste. (Co. Litt. 28 a, *infra, p.* 61.)

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[1] *Ex. gr.*, limitations to A. and the heirs of his body by his wife B. B. dies without having any children by A. Obviously A. cannot have issue capable of inheriting under the limitation.

Liability of Fees Tail for Debts.—During the life of the owner estates in fee tail can be taken under a writ of *elegit* for debts or damages for which judgment against him has been recovered; and if he becomes bankrupt, his trustee in bankruptcy can bar the entail for the benefit of the bankrupt's creditors. (Bankruptcy Act, 1914, s. 55 (5).)

On the death of the owner, however, the fee tail, unlike a fee simple, is not assets by descent in the hands of the heir of the body. Formerly, indeed, it was liable for none of its former owner's debts, save such as were owing to the Crown. (This liability arose under 33 Hen. VIII. c. 39, s. 75.) Now, by Judgments Act, 1838, ss. 11, 13, 18, and 19, it is also liable, both as against the heir of the body and the remainderman, for all debts of the deceased

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But nothing except the death of the person on whose body the heirs were to be begotten can create a tenancy in tail after possibility of issue. A divorce, for instance, would, it seems, merely make a tenant in special tail an ordinary life tenant. (2 Bl. 125; Co. Litt. 28 a.) And the great age of either of the parties could not affect the nature of the estate of the tenant in special tail, since the law fixes no limit of age when a person—male or female—is presumed to be incapable of having issue.

[1] By 14 Eliz. c. 8, he could suffer a recovery without vouching (as other life tenants had to do) the tenant in remainder. (2 Bl. Com. 362.)

owner for which judgment, decree, order, or rule exists, provided such judgment debts have, during the life of the debtor, been dealt with so as to make them actual charges on the land under recent legislation. As to debts, however, which are neither Crown debts nor have been made charges upon the land during the life of the tenant in tail, the old rule prevails, that a fee tail, though during the life of the owner an estate of inheritance, yet, on his death, is regarded as a life estate with remainder to the heir of his body. Accordingly, it is not liable for the debts of the deceased owner in the hands of the heir of the body.

Fees Tail not devisable.—Although a tenant in tail is able during life to bar his own issue or even to turn his estate into a fee simple, he can do neither of these by his will. If at the time of his death the estate is still an estate in tail, it will descend to the heir of his body independent of any disposition of it made in his will. Neither can he by his will charge it with the payment of any particular debt or with his debts generally. His will, in short, cannot in any way affect the right of the heir of the body to the estate which, on his ancestor's death, becomes vested in him immediately.

Tenant in Tail's Leasing Powers.—At common law, all leases granted by a tenant in tail, for whatever term they might be expressed to be, failed or became voidable on the death of the tenant in tail. Powers of granting leases for a limited number of years which would be good against the tenant in tail's issue, and afterwards, as against both his issue and the reversioner, were given by statute. (32 Hen. VIII. c. 28; Fines and Recoveries Act, 1833, s. 41.) And now all tenants in tail in possession (which includes tenants after possibility) are, for the purposes of the Acts, to be considered tenants for life within the Settled Land Acts, 1882—1890 (*see infra, p.* 75), and to possess all the powers of leasing therein given to the tenant for life.

Position of Tenant in Tail.—The position of the tenant in tail may then be summed up thus:—

(*a*) During his life he cannot alienate the estate or bar the entail, except by a certain formal proceeding prescribed by the Fines and Recoveries Act, 1833:

(*b*) He cannot, by his will, devise his estate:

(*c*) During his life his estate is liable for his debts (Judgments Act, 1838, ss. 11, 13, 18, 19):

(*d*) On his death his estate descends to the heir of his body free from all his debts, save those due to the Crown (33 Hen. VIII. c. 39, s. 75), and those which have been made during his life charges on the land:

(*e*) For purposes of sale, leasing, &c., he has all the power of a life tenant under the Settled Land Act, 1882, s. 58, sub-s. 1 (i).

Subject to the limitations here indicated, the tenant in tail in possession is practically complete owner of the land. He can use the land as he likes without liability to anyone. He can pull down any houses or other buildings upon it; he can cut any timber or ornamental trees growing on it; he can take any minerals in it—in short, he can commit whatever *waste* he chooses.

(c.) *Estates for Life.*

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Estates for Life.—The third and non-heritable kind of freehold interests is, as we have seen, estates for life or for lives. (For brevity we will speak of them throughout as estates for life or life estates.) An estate for life is simply an estate which is to continue until the death of some person or some one of several persons. A condition may be attached to it which may, in the result, determine it before the death of the person in question. It is then called "an estate for life determinable." (Co. Litt. 42 a.) The event which is to determine it must be one which, at the inception of the estate, was not certain to happen within any given time. If it is an event which is sure to happen at or before some fixed time, although, in the result, it may not be before the death of the person for whose life the estate is held, then the estate subject to it is not an estate of freehold. Thus, a grant to a widow during her widowhood is a good life estate. Though the marriage of the widow will determine the estate before her death, yet it is not certain that she will ever re-marry. But a grant for a hundred years, if the grantee shall so long live, is merely an estate for years liable to determine on the death of the grantee. The event here—the expiration of the hundred years—is certain to happen, and so a period is fixed beyond which the estate cannot extend. This is inconsistent with the nature of a freehold interest. It may be improbable that the person for whose life the estate is held may live a hundred years, but the law takes no account of probabilities or improbabilities in this connection. Besides, in law, no limit is fixed for the possible duration of human life.

Origin of Life Estates.—Estates for life may arise either by direct limitation or by operation of law.[1] Direct limitation may be either express or implied, or in the case of wills, by necessary implication. Thus, a limitation "to A. for his life," "to B. for the life of A.," "to C. for the joint lives of B. and A.," or "to D. for the life of C., B., or A., whichever may last longest," is express. On the other hand, a limitation in a deed—it is otherwise in a will—"to A." without more is an implied limitation to A. for his own life. And a limitation to "A. for the term of life"—without mentioning whose life—is an implied limitation to A. for his own life, provided the grantor can grant such an estate (an estate for the life of the grantee being esteemed the best kind of life estate):[2] but if the grantor cannot grant an estate for the grantee's life, then it is an estate for the grantor's life if he can grant that. The latter would be the case if the grantor himself were only a life tenant.

Under wills—but not under deeds—a life estate may be limited by necessary implication in this way. If an ancestor by his will leaves a fee simple to his heir on the death of some other person, it is held that he must have intended to give that other person a life estate, since in no other way can effect be given to the postponement of the heir's enjoyment of the land. (*Rex* v. *Inhabitants of Ringstead*, 9 B. & C. 218.)[1]

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[1] Blackstone calls those arising by direct limitation *conventional*, and those arising by implication, *legal* estates.

[2] The general rule as to grants is that the grant should be construed most strongly against the grantor, save the grantor is the King. (2 Bl. 121.) This rule, however, has never been applied to grants of freehold where no estate is expressly limited, otherwise a grant to A. *simpliciter* would carry all the estate the grantor was entitled to convey. By sect. 28 of the Wills Act, 1837, such words in a will have now that operation. *See* Under. & Strahan's Wills and Settlements, Art. 36.

Life estates arising by operation of law are such estates as estates by the curtesy (*infra*, *p*. 314), estates in dower (*infra*, *p*. 315), and the life estate which descends to an heir-at-law when by the will of his ancestor land in fee simple is devised to some one from the death of the heir-at-law or another, and the immediate freehold is undisposed of by the will, *ex. gr.*, "to A. in fee simple from the death of my eldest son, B."; here, if no gift is made of the land during B.'s life, B. takes it as heir to the testator. This is the converse of the gift by will of a life estate by necessary implication.

Kinds of Life Estates.—Life estates are primarily divided according as the life for which they are held is the life of the grantee or the life of some one else. If they are held for the life of the grantee they are ordinary life estates; if they are held for the life of some one else they are estates *pur autre vie*. Sometimes an estate may belong in a way to both classes. Thus, a grantee may hold an estate for his own life and the life of another, or whichever may last determine. Here, as long as both the grantee and the other person live, the nature of the estate is indeterminate. On the death of the grantee first it becomes an estate *pur autre vie*. On the death of the other person first the estate becomes an ordinary life estate. The person for whose life an estate *pur autre vie* is held is called the *cestui que vie*.

Estates pur autre vie.—Estates *pur autre vie* (which, as we have seen, may be for the life of another person than the owner, or for the joint lives of several other persons, or for the life of the survivor of several other persons) arise either by express limitation, or by the alienation of his life estate by an ordinary tenant for life, in which case the new tenant holds for the life of the old one. They differ from ordinary life estates chiefly in this, that they may survive the tenant. This, as life estates are not hereditary, and were not originally devisable, used to lead to a peculiar state of things. Whether on the death of the tenant before the *cestui que vie* the estate had an owner at all or not depended on how the estate was limited. If it were limited to the tenant and his heirs, the heir entered not as heir (*Ripley* v. *Waterworth*, 7 Ves. 425), but as *special occupant*, that is, as the person to whom the estate was given after his ancestor. If it were limited to the tenant simply, then it was regarded as *res nullius*, and the first person who entered upon it after the deceased tenant's death was entitled to hold it, or, if anyone was at the owner's death in actual occupation of it, it vested in him as *general occupant*. (*See Re Inman*, *Inman* v. *Inman*, (1903) 1 Ch. 241.) In neither case was it liable for the deceased tenant's debts. (*Doe* v. *Luxton*, 6 T. R. 289, at p. 291.) To make it liable for the payment of his debts, and at the same time to do away with any uncertainty as to whom it should go to on the owner's decease, sect. 12 of the Statute of Frauds, 1677 (Irish Act, 7 Will. III. c. 13), provided that every estate *pur autre vie* should be subject to the deceased tenant's will; and if it were allowed to go to the heir as special occupant it should be liable in his hands as if it were fee simple for the late tenant's debts, and if the tenant died intestate as to it, and there was no special occupant, it should go as assets to the tenant's executors or administrators. A later statute (14 Geo. II. c. 20, s. 9) further enacted that executors or administrators should apply *pur autre vie* estates coming to them under the Statute of Frauds as if they were personalty. (*See Part IV.*) These enactments are both repealed and re-enacted by the Wills Act, 1837, ss. 2, 3, and 6, and extended to *pur autre vie* estates in copyholds, and incorporeal hereditaments.

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[1] The same rule applies when the gift is of personalty to the testator's next of kin on the death of a certain person. (*See In re Springfield, Chamberlain* v. *Springfield*, (1894) 3 Ch. 603.)

Estates *pur autre vie* may in a manner be entailed, that is, they may be limited to the grantee and the heirs of his body. When so limited, the heirs of the body will take as special occupants in succession during the continuance of the estate *pur autre vie*. This is called a *quasi-entail*. It appears that these quasi-entails can be barred, save as to quasi-remainders on them by will. (*Dillon* v. *Dillon*, 1 Ball & B. 77.) A tenant in quasi-entail in possession can, by ordinary deed without enrolment, bar both issue and quasi-remainders, but if he be not in possession he can bar the quasi-remainders only with the assent of the tenant in possession. (*Allen* v. *Allen*, 2 Dr. & War. 307, 324, and 332.)

As the existence of an estate *pur autre vie* depends upon the life of the *cestui que vie*, it is important to the person entitled to the land on the determination of the estate *pur autre vie*, that he should be able to prevent any concealment of the death of the *cestui que vie*. To enable him to do this it is provided by 6 Anne, c. 18, that once in every year on affidavit by the person next entitled after an estate *pur autre vie* that he has reason to believe the *cestui que vie* is dead, and that his death is concealed, the Chancellor shall order the production of the *cestui que vie*, and if this order be not complied with the *cestui que vie* will be taken as dead, and the person next entitled may enter and take the profits of the land until the *cestui que vie* be actually shown to be living. Moreover, any tenant *pur autre vie* holding over after the determination of his estate without the express consent of the person next entitled, is declared to be a trespasser. (Sect. 5.) This Act applies not merely to strict estates *pur autre vie*, but to all interests determinable on death whether, strictly speaking, estates *pur autre vie* or not. (*In re Stevens*, 31 Ch. D. 320; and *In re Pople*, 40 Ch. D. 589.)

Incidents of Life Tenancy.—In practice the incidents of life tenancies are usually regulated by the terms of the instruments creating the estate. This being so, they vary of course with the views of the grantors. But occasionally the instrument creating a life tenancy is silent as to incidents. In that case they are settled by the general law. Shortly, these legal incidents are liability for waste, right to emblements, right to fixtures, and subjection to alienation, voluntary and involuntary.

Waste.—There are three kinds of waste recognized by the law. The first is *voluntary* or common law waste; the second is *permissive* or conventional waste; the third is *equitable* or unconscionable waste.

Voluntary waste arises when the life tenant uses the land so as to alter its nature (as, for instance, by building houses on agricultural land: *Brooke* v. *Kavanagh*, 23 L. R. Ir. 97), or so as to make the land less valuable to the person entitled to it on the determination of his life estate (as, for instance, by pulling down houses already on the land: *Lord Castlemaine* v. *Lord Craven*, 22 Vin. Abr. 523, tit. Waste). I have called voluntary waste common law waste because, when the instrument creating the life estate is silent on the point, this kind of waste is forbidden (and it is the only kind forbidden) by the common law.[1]

The chief acts which are held to be acts of voluntary waste are:—

(*a*) Pulling down buildings on the land (*Vane* v. *Lord Barnard*, commonly called the *Raby Castle Case*,

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[1] It is, perhaps, scarcely accurate to call voluntary waste common law waste so far as ordinary life estates are concerned, since the common law imposed it only on life estates arising by operation of law. (*Supra, p.* 59.) The tenant of a life estate arising by limitation was not liable at common law for waste. He was made liable by the Statutes of Marlbridge (52 Hen. III. cc. 1—21) and of Gloucester (6 Edw. I. c. 5). (*See* Co. Litt. 231 a.)

2 Vern. 738), or erecting new buildings on it which will change the nature of the property, *ex. gr.*, building houses on agricultural land. (*Brooke* v. *Kavanagh*, 23 L. R. Ir. 97.)

(*b*) Breaking up ancient meadow land, destroying hedges, removing drains or otherwise altering injuriously the character of the land.

(*c*) Opening mines and raising minerals on the land.

Mines open when the estate for life was created may be worked without committing waste, provided they are worked for the same purposes only as those for which they previously were worked. (*Elias* v. *Snowdon Slate Quarries Co.*, 4 App. Cas. 454; *and see In re Chaytor*, (1900) 2 Ch. 804.)

(*d*) Cutting down timber growing on the land.

What is timber depends on the general law and on local custom. By the general law oak, ash, and elm are timber provided they are at least twenty years old, and are not so old as to be rotten. By local custom other trees besides—such as beech—may be made timber, and at the same time the test as to when a tree becomes timber may be varied. Thus, for example, an oak by local custom may not be timber until it is twenty-four years old, or until it has a girth of a given measurement. Besides timber, a tenant for life cannot cut ornamental trees which are not timber, stools of undergrowth, trees planted to protect banks or timber trees under age, unless for purposes of management. (*Honywood* v. *Honywood*, L. R. 18 Eq. 306.)

This rule as to cutting timber is subject to two exceptions. In the first place a tenant for life is entitled to *estovers* (from *estoffer*, to furnish: 2 Bl. Com. 35)—that is, he is entitled to take so much of the timber growing on the land as is necessary for the proper use and enjoyment of the land. Estovers consist of housebote (which includes firebote), haybote and ploughbote. (Co. Litt. 41 b, and

53 b.) In the second place, in the case of timber estates, that is, land used merely for the purpose of growing timber trees, the tenant for life may cut and sell for his own benefit the yearly increase of the timber in a proper and husbandlike manner without committing waste. (*Dashwood* v. *Magniac*, (1891) 3 Ch. 306.)

Permissive waste arises when the life tenant, being forbidden by the instrument conferring the life estate upon him to do so, permits the buildings or other works upon the land to get into a state of disrepair. It is called permissive because it is due, not to the act of the tenant but to his failure to act. I have called it *conventional* because it is not imposed upon the tenant by the law; it is imposed upon him only by his acceptance of the estate subject to the condition to keep the works on the land in repair. (*In re Cartwright*, 41 Ch. D. 532, discussing *Woodhouse* v. *Walker*, 5 Q. B. D. 404; *Barnes* v. *Dowling*, 44 L. T. 809; *In re Freman, Dimond* v. *Newburn*, (1898) 1 Ch. 28.) The extent of the obligation to keep in repair depends on the words of the instrument, but where these are general the Court will not hold that any repairs of an unusual and expensive character—such as the cleansing of an artificial lake—come within them. (See *Dashwood* v. *Magniac, supra*.)

Equitable waste arises when the life tenant is by the instrument conferring the life estate upon him not merely made not liable for permissive waste but is expressly declared not to be liable for voluntary waste, and he takes advantage of this declaration to do acts destructive of the property. It is called equitable waste because it was regarded only in equity as waste: the common law held that a tenant who by the instrument was made not liable—or impeachable, as the term is—for waste could commit what waste he liked. The Court of Chancery, while recognizing his right to commit waste, would not permit him to make an unconscientious use of such right. That is why I have called equitable waste unconscionable waste.

It would not permit him, for instance, to dismantle the mansion house of the estate (*Castle Raby Case*, 2 Vern. 738), or cut timber planted for ornamental purposes (*see Weld Blundell* v. *Wolseley*, (1903) 2 Ch. 664), save under the supervision of the Court, or do any other act of spoliation. (*Baker* v. *Sebright*, 13 Ch. D. 183; *Garth* v. *Cotton*, 1 W. & T. 750; and 1 Ves. 524, 546.) The Judicature Act, 1873, s. 25, sub-s. 3, which fused the administration of law and equity, expressly enacts that an estate for life, without impeachment of waste, will give no legal right to commit equitable waste. Of course, the instrument creating the life estate may confer on the life tenant the right to commit equitable waste, but an intention to confer this right must clearly appear before the Court will acknowledge it.

Under the Statute of Gloucester (6 Edw. I. c. 5) the commission of an act of voluntary waste was a cause of forfeiture of the life tenant's estate. The old writ of waste by which the forfeiture was enforced was, however, abolished by Real Property Limitation Act, 1883, s. 36, and now the remedy for all kinds of waste is by way of damages and injunction. The latter is the equitable and the more effectual remedy, but, like other equitable remedies, it is always in the discretion of the Court to grant it. Sometimes it is refused when the act complained of is nominally waste, but is really for the benefit of the property—is what is called *meliorating* waste. (*Doherty* v. *Allman*, 3 App. Cas. 709; *Meux* v. *Cobley*, (1892) 2 Ch. 253.) In such case the plaintiff is left to his legal remedy in damages, and since he can prove no damage he is practically without remedy. But before the Court refuses to restrain acts that are admittedly waste, it must be made clear that they are altogether for the benefit of the inheritance; if in some respects they may be for its benefit while in others they are to its disadvantage, the Court will restrain them. (*West Ham Central Charity Board* v. *East London Waterworks Co.*, (1900) 1 Ch. 624.)

Emblements.—By emblements are meant, shortly, the year's crops—*fructus industriales*—and the right to emblements is the right of the tenant *pur autre vie*, or, in the case of an ordinary life tenancy, of the tenant's executors or administrators, on the determination of the life estate between seed time and harvest to have the current year's crops. For the purpose of taking the crops, the tenant or his representatives are entitled, at harvest time, to enter upon the land. This right does not exist, as far as the life tenant is concerned, when the estate is determined by the tenant's own act: for example, when an estate to a widow during her widowhood is ended by her remarriage.

The right belongs to the sub-tenants of the life tenant in all cases, even in those where the life estate, on which the sub-tenancies depend, is determined by the voluntary act of the life tenant. (1 Rolle, Abr. 727.) It has been enacted, however (Emblements Act, 1851, s. 1), that tenants holding at a rack rent (which means at the full value of the land) under a tenant for life or for any other uncertain interest, instead of being entitled to emblements shall continue to hold on the same terms to the end of the current year of their tenancy.

Rents are now regarded as accruing from day to day, and on the determination of a life estate between two rent days, the rent for the current quarter, payable by sub-tenants, is apportioned on that basis between the tenant for life and his representatives, and the remainderman or reversioner. (Apportionment Act, 1870, ss. 2 and 7.) Formerly, in such a case no one could recover the rent for the period between the last quarter day and the death of the life tenant, as at common law none was due to the life tenant or his representatives as the sub-tenancy determined before quarter day—when the rent was payable—and none was due to the reversioner as there was no tenancy under him. This was first altered by 11 Geo. II. c. 19, s. 15, which gave the executors or administrators of a deceased tenant for life a right to claim a proportionate part of the rent where the life tenant died before quarter day.

Fixtures.—On the determination of a life estate, the life tenant or his personal representatives are entitled to remove from the estate all *fixtures* attached to the land by the life tenant. What are fixtures will be considered in the chapter dealing with tenancies for a time certain, in connection with which questions in respect of them most frequently arise. (*See infra, p.* 94.) It may, however, be noted that what are to be considered fixtures may be varied by the relationship between the person who fixed them and his successor. (*See In re Whaley*, (1908) 1 Ch. 615; *In re Lord Chesterfield's Settled Estates*, (1911) 1 Ch. 237.)

Alienation.—Estates for life, like tenancies for a time certain, may be made by the instrument creating them forfeitable on any attempt to alienate them, but if there is no such provision in that instrument they are by law freely alienable by the owner during his life, and, as we have seen, when they survive him, they are subject to his will. Of course (independently of the Settled Land Acts (*see infra, p.* 72)), he can alienate only the interest he owns, and the estate alienated will come to an end in the hands of the vendee or purchaser precisely at the same time as it would have determined had the grantee retained it. Formerly, if a tenant for life attempted to transfer the fee by feoffment (*see p.* 243, *infra*), this was held a tortious (or wrongful) conveyance, and was a ground of forfeiture of the estate. The Real Property Act, 1845, s. 4, provides that a feoffment made after 1st October, 1845, shall not have any tortious operation.

Not merely is an estate for life alienable at the will of the owner, but it is also liable for his debts both during his life and (as we have seen), if it survives him, after his death.

Leases and Estates for Life.—The common law recognizes no differences between estates for life where the tenant holds the land for his own benefit, and estates, or more strictly, leases for life, where the tenant holds the land at a rent which usually is its full, and may be more than its full value. Such a distinction, however, has long been recognized by the legislature, and, in many statutes, rights are conferred on the former class which are denied to the latter. We saw one instance of that in the Fines and Recoveries Act, 1833, under which the office of protector vests not in the first tenant holding a freehold interest, but the first tenant holding a freehold interest for his own benefit. The same distinction is observed in the Settled Estates Act, 1877, and still more markedly in the Settled Land Acts, 1882—1890, which confer (*see p.* 72, *infra*) great powers not merely of leasing, but of sale, exchange, and management over the settled lands upon the beneficial life tenant in possession. The lessee for life at a rent has none of these powers. He can sell only his life interest, and any lease he may grant determines upon the determination of his life estate.[1]

As we shall see, the powers vested in the beneficial tenant for life are to be exercised not for his own benefit but for the benefit of the inheritance, thus differing from the common law powers which he and the lessee at a rent equally enjoy, and which they exercise for their own exclusive advantage.

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[1] These remarks do not apply strictly to the Irish perpetually renewable leases for lives, as to which *see supra, p.* 42.

A. *Settlements of Freeholds.*

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Number of Estates in Same Land.—Estates in fee simple, estates in tail, and estates for life, are, then, the three freehold interests which can subsist in land. All three can subsist in the same plot of land at the same time, though, of course, only one can at one time be in possession, that is, in actual enjoyment. Not only so, but any number of estates in tail and for life can subsist at the same time in the same land. Thus, A. may have a life estate in Blackacre, B. may have a fee tail to follow A.'s life estate, C. may have a fee tail to follow B.'s, and D. may have a life estate to follow C.'s fee tail. Of course, all the interests, whether life estates, fees tail, or fees simple that follow any fee tail, are liable to be destroyed, or barred, by the owner of that fee tail turning his estate into a fee simple.

This brings us to the second point. With regard to fees simple, three characteristics should be noted. In the first place, though there may be any number of life estates and fees tail in the same parcel of land, there can at common law be only one estate in fee simple. In the second place, though life estates and fees tail may or may not subsist in any parcel of land, a fee simple estate must subsist in every parcel in the kingdom not actually owned by the Crown. In the third place, where there are several freehold estates in a parcel of land, the fee simple must at common law come last.[1] These three characteristics arise out of the one already referred to, namely, that fee simple practically constitutes, while no other interest or number of interests can constitute, full ownership of land at common law.

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[1] As a matter of fact, in most settlements now a fee simple comes first as well as last. The first fee simple is a determinable

Settlements of Freeholds.—Where there are several freehold estates subsisting in the same land at the same time, this is usually due to the land being in settlement, as it is called. A settlement is defined in the Settled Land Act, 1882 (sect. 2), as any instrument or number of instruments under or by virtue of which any land or estate or interest in land stands for the time being limited to or in trust for any persons by way of succession. (*See In re Pocock and Prankerd's Contract*, (1896) 1 Ch. 302.)

Settlements came into fashion nearly two centuries after the practical repeal of the statute *De Donis*, and their object was much the same as that of the statute—to preserve hereditary estates in the family of the grantee. There was this difference, however, that while the statute preserved them in the grantee's family for the benefit of the grantor and his heirs, settlements so preserved them for the benefit of the grantee's family itself. Settlements accomplished this by the device of preventing, as far as possible, the inheritance in the land remaining for any length of time in the hands of any person or persons capable of alienating it. The *modus operandi* was as follows:—The law did not permit interests in land to be given beyond the existing generation and the coming one, that is, beyond a living person and his unborn child. (*See infra*, p. 152.) This, however, by an ingenious manipulation, was made sufficient, practically, to keep the power of alienation in continual abeyance. Thus, A. is the owner of fee simple lands which he wishes to settle or tie up as

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one (*see supra*, p. 37), limited to the settlor by way of use to determine on his marriage, and the last is the ultimate fee, also limited to the settlor after the estates limited to the issue of the marriage. (*See* Strahan's Convey. Part IV. Sect. II.)

strictly as possible. On his marriage, he settles these lands on himself for life with remainder in fee tail to the first-born son of the marriage. There are other uses usually limited, as fees tail on death of the eldest son without heirs of the body to the second and other sons in succession, and on failure of sons, cross-remainders among the daughters, and powers are reserved to dower the widow and raise portions for the younger children out of the land. (*See* Strahan's Convey. Part IV. Sect. III.) These, however, do not affect our point at present, and, for the sake of clearness, we will omit further reference to them. The original limitation, then, is to A. for life with remainder in fee tail to the first son of the marriage. We will call this first son B. Now the effect of the limitation is that the estate tail cannot be barred by any one until B. attains twenty-one years of age, B. being till then an infant. B., on and after attaining that age, can with A.'s consent (A. being protector of the settlement) bar the estates tail, but if A. refuses his consent, then during A.'s life B. can create only a base fee. This base fee, until B. marries and has children, is little better than an estate for B.'s life in expectancy on A.'s life estate —an estate so uncertain as to be practically unsaleable. Meanwhile though entitled ultimately to the whole property in the land, B. has no present income from it. Accordingly, B. usually comes to an arrangement with A. whereby B., in consideration of receiving a part of the income of the property during A.'s life, consents to join with A. in breaking the entail and resettling the fee simple resulting. (*See* Strahan's Convey. Part IV. Sect. III.) The fee simple is resettled as before—to B. for life subject to A.'s prior life estate, with remainder in tail to B.'s first son, &c. The effect of this is again to make the fee tail inalienable until B. has a son of the age of twenty-one. On that son's coming of age, the estate is again resettled in the same way. By this means it is so managed that almost as soon as alienation of the inheritance in the land is possible, the power to alienate is taken away again by a resettlement, which leaves to no living person more than a life estate, or a life estate and a fee simple in reversion to a contingent fee tail, which fee simple, as we have seen, is liable to be barred as soon as the fee tail gets into the hands of a person over twenty-one years of age.

Settled Land Acts, 1882—1890.—The system of tying up land was found to militate against its proper management and development. To remedy this it became customary to introduce provisions into the instrument of settlement giving to the tenant for life or to the trustees of the settlement, or to both jointly, large powers of leasing, exchange, and sale over the settled land. Owners, however, who were more anxious to preserve certain land in their family than to improve it, refused to give these powers, often with results disastrous to the community. After various attempts on the part of the legislature to mitigate these evils, of which the most important was the Settled Estates Act, 1877, at last, in 1882, the Settled Land Act was passed. Put shortly, its effect is to give to every life tenant under a settlement of freehold or leasehold land all the powers usually given in a generously drawn settlement to the life tenant or the trustees, or both jointly. (*See In re Clitheroe*, 28 Ch. D. 378, at p. 389.) That Act has since been amended by Acts passed in 1884, 1887, 1889, and 1890, and the general name for all this legislation is the Settled Land Acts, 1882—1890. These Acts extend to England and Ireland, but not to Scotland. (Sect. 1, Act of 1882.) The Settled Estates Act, 1877, is not expressly repealed by them, but it is practically superseded.[1]

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[1] On one point the Settled Estates Act, 1877, is still useful. A tenant in dower (*see infra, p.* 315) and a husband seised in fee in right of his wife are not life tenants within the Settled Land Acts, but by sect. 46 of the Settled Estates Act, 1877, they can make leases of twenty-one years.

Before considering these Acts in detail, it is well to note three points with regard to the powers of sale and management which they confer. In the first place these powers are imported into every settlement, whether made before or after the passing of the Act of 1882, and whether the settlor wishes them to be imported or not. Any attempt to exclude or restrict them, whether by a direction in the settlement (sect. 51, Act of 1882) or by a contract entered into by the life tenant not to exercise them (sect. 50, Act of 1882), is expressly declared to be void.[1] In the second place the powers given by the Acts are not in substitution for powers expressly given in the settlement, but in addition to such express powers; in other words, the tenant can exercise not merely the statutory powers but also the express powers if the latter are in any way more extensive than the former. In the third place the exercise by the life tenant of these powers has no effect on the trusts or limitations of the settlement. The money or land procured by their exercise is paid or conveyed to the trustees of the settlement, and is held by them subject to the same trusts and limitations as bound the original settled land. And this is the case even when the person exercising the powers is tenant in fee tail of the settled land. Such a tenant, as we have seen, can bar the subsequent limitations by deed enrolled under the Fines and Recoveries Act, 1833, but he can do so in no other way. A sale by him under these Acts has no effect whatever in barring the entail under the settlement; it merely transfers it from the land—which the purchaser receives in fee simple—to the purchase-money which, for the purposes of the settlement, the law will regard as the land itself. The trustees of the settlement cannot pay over the purchase-money to him until he bars the entail affecting it by enrolled deed.

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[1] When, however, the settlement is made by way of trust for sale the life tenant's powers can be exercised only with the consent of the Court. (Sect. 7, Settled Land Act, 1884; *and see* Strahan's Convey. Part IV. Sect. III.)

Tenant for Life under Acts.—The powers, as we have seen, are primarily given to the tenant for life, and the tenant for life for the purposes of the Acts is defined to be the person beneficially entitled to the possession of the settled land for his life. (Sect. 2 (5), Act 1882.) ("Settled land" includes any estate or interest in land which is the subject of a settlement. (Sect. 2 (3).) And a tenant in tail (sect. 58, Act 1882), and an infant tenant absolutely entitled (sect. 59, Act 1882), are to be considered tenants for life for the purposes of the Act, though in the latter instance (as in all cases where the person who would have the powers of a tenant for life if he were of full age is an infant) the powers are to be exercised not by the infant but by the trustees of the settlement, or, if there be no trustees, by any one approved of by the Court. (Sect. 60, Act 1882.)

As to the words "person beneficially entitled to possession," that means a person entitled to the land or the profits of the land (*In re Pollock, Pollock* v. *Pollock*, (1906) 1 Ch. 146) as owner, in opposition to a person entitled in consideration of rent or other payment. It does not mean that the person must be entitled to the full benefit resulting from the land. Thus it has been held that the fact that the land was so heavily mortgaged that the life tenant received no income, nor had any immediate prospect of receiving any, did not prevent his being beneficially entitled under the Acts. (*In re Jones*, 26 Ch. D. 736.) And the powers given are personal to the tenant for life under the settlement. If he sells his life estate the purchaser of it has not the powers of a life tenant. Those powers remain in the original life tenant after he has parted with all interest under the settlement, and he may exercise them subject to this, that he shall not do so in such a way as to defeat interests previously created by himself. He cannot assign or release them. (Sect. 50, Act of 1882; *In re Mundy and Roper's Contract*, (1899) 1 Ch. 275.)

Trustees within the Acts.—The second class of persons to whom important functions are delegated by the Acts are the trustees of the settlement. These are:—

(1.) Trustees under the settlement with an immediate power of sale, or with power to approve or consent to sale of the settled land. (Sect. 2, sub-s. (8), Act 1882.)

(2.) In absence of these, then any persons declared in the settlement to be trustees for the purposes of the Acts. (Sect. 2, sub-s. (8), Act 1882.)

(3.) In absence of these, trustees under the settlement with power of or trust for sale, or with power to consent to sale, of other lands similarly settled. (Sect. 16, Act 1890; and see *In re Moore, Moore* v. *Bigg*, (1906) 1 Ch. 789.)

(4.) In absence of these, trustees under the settlement with a future or contingent power of or trust for sale, or power to consent to sale, of the settled lands. (Sect. 16, Act 1890.)

(5.) In absence of all these, Court will appoint proper persons to be trustees for purposes of the Acts. (Sect. 38, Act 1882.)

Powers given to Tenant for Life by Acts.—The powers given by the Acts to the tenant for life are numerous. The most important are the following:—

√ (1.) To sell the settled land or any part of it, or any easement, right, or privilege over it. (Sect. 3, sub-s. (1), Act 1882.) The mansion-house and the lands usually occupied therewith cannot be sold without the consent of the trustees or an order of the Court, unless where such house is usually occupied as a farmhouse or where the site of the house and the lands usually occupied therewith do not together exceed twenty-five acres in extent. (*See Dowager Duchess of Sutherland* v. *Duke of Sutherland*, (1893) 3 Ch. 169.) (Sect. 10, sub-s. (2), Act 1890.) Where the trustees' consent has in fact been given it may not be formally expressed. (*Gilbey* v. *Rush*, (1906) 1 Ch. 11.)

(2.) To exchange the settled land, or any part thereof, for other land, and take money for equality of exchange. (Sect. 3, sub-s. (3), Act 1882.) There are two limitations to this power: one as to mansion-house as in sale (*supra*), and one prohibiting exchange of land in England for land out of England. (Sect. 4, sub-s. (8), Act 1882.)

(3.) To concur in partition of settled land. (Sect. 3, sub-s. (4), Act 1882.)

(4.) To grant leases of the settled land, or of part thereof, or of any easement, right, or privilege over it, whether involving waste or not, building lease not to exceed ninety-nine years, mining lease sixty years, other lease twenty-one years in England, thirty-five years in Ireland. (Sect. 6, Act 1882.) Building or mining lease may, with consent of Court, be extended even to lease in perpetuity (sect. 10, Act 1882), and may, without such consent, contain an option to purchase within ten years at a fixed price. (Sect. 2, Act 1889.)

(5.) To accept, with or without consideration, surrender of lease of settled land. (Sect. 13, Act 1882.)

(6.) To appropriate land for streets, gardens, open spaces, &c., in connection with building leases. (Sect. 16, Act 1882.)

(7.) To make, vary, or rescind contracts to carry into effect the purposes of the Acts. (Sect. 31, Act 1882.)

(8.) With consent of trustees or order of Court to cut and sell timber ripe and fit for cutting, though the tenant for life be impeachable for waste. (Sect. 35, Act 1882.)

(9.) With order of Court to sell quasi-heirlooms, that is, personal chattels settled to accompany the inheritance. (Sect. 37, Act 1882.)

(10.) To raise money by mortgage of settled land for the purpose (a) of paying off incumbrances (sect. 11, Act 1890); (b) for paying for equality of exchange or partition (sect. 18, Act 1882); (c) for paying costs ordered by Court to be paid out of settled lands. (Sect. 47, Act 1882.)

Conditions of exercising Powers under Acts.—These powers must be exercised subject to the following conditions:—

(1.) Where a consent of the trustees or an order of the Court is necessary, such consent or order must be obtained before the power is exercised. (*In re Ames*, (1893) 2 Ch. 479.)

(2.) In any case, notice in writing of intention to exercise a particular power, or a general notice to exercise powers under the Acts, must be given to two of the trustees and their solicitors at least a month before exercising the power. (Sect. 45, Act 1882.) But a person dealing with a tenant for life in good faith need not inquire whether such notice has been given, and the transaction will be good even if as a fact no notice has been given (*Mogridge* v. *Clapp*, (1892) 3 Ch. 382); and in the case of leases for periods not exceeding twenty-one years, no notice to trustees is necessary, and such leases may be made without there being any trustees existing. (Sect. 7, Act 1890.)

(3.) A sale or exchange must be at the best price (*In re Chawner's Settled Estates*, (1892) 2 Ch. 192) or for the best consideration that can reasonably be obtained. (Sect. 4, Act 1882.) If a bribe be given by the purchaser to the tenant for life to induce him to carry out the transaction, the Court will hold the transaction void. (*Chandler* v. *Bradley*, (1897) 1 Ch. 315.)

(4.) In all cases the tenant for life is to have regard to the interests of all parties entitled under the settlement, and is to be deemed to be in the position of, and to have the liabilities of, a trustee for such parties. (Sect. 53, Act 1882; *Dowager Duchess of Sutherland* v. *Duke of Sutherland*, (1893) 3 Ch. 169; *In re Hunt's Settled Estates*, (1905) 2 Ch. 418.)

(5.) The trustees have an absolute discretion in their exercise of their functions under the Acts, and, provided they act honestly, they are not liable for anything resulting from their action or inaction. (Sects. 41 and 42, Act 1882; *In re Egmont's (Earl) Settled Estates*, (1906) 2 Ch. 151.)

Application of Capital Money under Acts.—The money arising through the exercise of the powers given by these Acts is called capital money, and the Acts make provision for the manner in which it shall be dealt with. Generally speaking, it is either to be held by the trustees of the settlement on the trusts of the settlement, or employed by the tenant for life with their consent for the benefit of the whole settled estate. These ends are secured by the following particular provisions:—

(1.) Capital money may be paid to the trustees or into Court at the option of the tenant for life. (Sect. 22, Act 1882.)

(2.) In either case, if invested, the investment is to be made in authorized securities, the tenant for life having the first right to select among these; which right, if honestly exercised (*see In re Hunt, Bulteel* v. *Lawdeshayne*, (1905) 2 Ch. 418), cannot be interfered with by the trustees or the Court (*In re Lord Coleridge's Settlement*, (1895) 2 Ch. 704); and the income arising from the investment is to be applied in pursuance of the trusts of the settlement. (Sect. 22, sub-s. (2), Act 1882.)

(3.) If not invested in authorized securities, it may be applied—

  (*a*) In discharge of incumbrances upon the settled land remaining unsold (sect. 21 (ii.), Act 1882); or

  (*b*) In improvements on the settled land as authorized by the Acts, according to a scheme approved by the trustees or the Court (sect. 21 (iii.), and sects. 25, 26, Act 1882, and Act 1887); or

  (*c*) In purchase of other lands to be held on the trusts of the settlement. (Sect. 21 (vii.), Act 1882.)

SUB-SECTION 2.

CHATTEL INTERESTS.

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Origin of Leaseholds.—Originally, as we have seen, the only interests in land recognized by the law were freehold interests. The tenant of a parcel of land either had in him a freehold interest, or he had no legal interest at all, but merely held at will of the legal owner. Tenants at will were at first serfs, to whom their lord gave permission to farm part of his land during his pleasure. Gradually, as the serf became a freeman, villein tenure approximated to free tenure, and his tenancy at will (now called a copyhold) became a legal and heritable estate. (*Supra, p.* 27.)

The law, in transforming the nature of villein tenure, did not alter the interests which could be held in land. In copyholds, as in freeholds, the only interests recognized by the law were estates for life and estates of inheritance. Any agreement between an owner of land and another to grant to the latter an interest different from these—such as a tenancy for a term of years—was regarded as a mere personal contract between the parties. It conveyed no legal interest in the land to the grantee. He could not obtain possession of the land by an action against the grantor, and if he was given possession of it in pursuance of the contract, the grantor might at any moment defeat his tenancy by suffering a recovery.[1]

It is not necessary for our purposes to trace the steps by which contracts for the hiring of land for a certain time, from being mere personal agreements between the parties, came to convey an indefeasible interest in the land itself.[2] It is sufficient to say that since 21 Hen. VIII. c. 15, any such contract, when followed by entry on the land affected by it, conveys to the hirer a legal estate according to the terms of the agreement. Until an entry has taken place, the lessee is still regarded as having no legal estate in the land. (*Wallis* v. *Hands*, (1893) 2 Ch. 75.) He has only what is called an *interesse termini*. (*See infra, p.* 248.) Where, however, a lease for a time certain is created by bargain and sale (*i.e.*, when the agreement is to buy the use of the land for the term and the purchase-money is paid to the lessor), then the grantee is, by force of the

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[1] The reason why a recovery defeated a term of years was this: A recovery was in theory an action to recover the land from the tenant in fee in possession, on the plea that the latter had not and the recoveror had a good title to the fee. The effect, then, of a judgment in favour of the recoveror was technically to establish this plea. Since this was so, all the leases of the land made by the previous tenant in fee were bad as against the recoveror. (Co. Litt. 46 a.)

[2] *See* Maitland's Equity, pp. 350 and 351.

Statute of Uses, 1536, deemed in law to be in possession from the bargain and sale. (*See infra, p.* 245.)

Differences between Freehold and Leasehold Ownership.—Tenancies for a time certain in land, being interests unknown to the ancient common law, were treated by it with scant favour. Even after they had been made by statute indefeasible, it refused to regard them as estates in the land. The only ownership in land it would recognize was freehold ownership. And such is the case still. The freeholder, however small his interest, has, for the time being, the full property in the land. The tenant for a time certain, however large his interest, never has: he is regarded merely as having a right by virtue of his contract with the freeholder to use the land, which, however, remains the property, and the sole property, of the freeholder. He is not considered even as having the full legal possession of the land: he merely occupies as the bailiff of the freeholder, who, in the eye of the law, is really in possession. This is usually described by saying that every freeholder has the *seisin* of the land, while no leasehold owner ever has it. (*See Copestake* v. *Hoper*, (1908) 2 Ch. 10.)

This insistence of the law, that tenancies for a time certain in land are not parts of the ownership, but merely contractual rights as to the user of the land, absurd enough as it may seem in view of the circumstance that such tenancies now often are practically equivalent to and even may in fact be turned into fees simple (*see infra, p.* 88), has had nevertheless very important consequences. In the first place, to it, no doubt, is largely due the fact that tenancies for a time certain were and are regarded as personalty, and were therefore, even before a remedy was given for judgment debts as against freehold interests, liable to be taken as goods by the sheriff, and went, and go still, on the death of their owner, to his executors or administrators. (*See infra, p.* 277.) This is the reason why they are called chattel interests in the land or chattels real. In the second place, the right of ownership, whether of land or goods, is a continuous right. (*See* Strahan's Convey. Part IV. Sect. III.) If the owner of goods casts them away with the intention of abandoning his property in them, his ownership ceases for ever; if it is to be revived he must re-possess himself of them before anyone else takes them, and then he will hold by a new title —that of occupation of *res nullius*. (*See infra, p.* 231.) So in land, where the law does not permit ownership to be abandoned, any limitation of the ownership which leaves or may leave the seisin, as it is called, or the real or freehold ownership, without an owner even for a day, always was and is bad *ab initio*. In other words, ownership of any kind must be continuous, not intermittent. But there is no such rule as to contractual rights. Accordingly, a lease of lands may be good only at intervals. Thus, if A. is tenant for life, B. tenant for life after A., and C. tenant for life after B., and A. and C. grant a lease at common law to D. for a hundred years, this lease is good against A. and C., but not against B. If on A.'s death B. be living, D.'s lease is dormant during B.'s life. On B.'s death, if C. be then living, it revives and continues a good lease during C.'s life. (Co. Litt. 46 a.) And again, a lease of land during three bank holidays, namely, Whit Monday, Easter Monday and the first Monday in August, is but one lease, and it is a good lease, though for three days, each separated by long intervals from the others. (*Smallwood* v. *Sheppards*, (1895) 2 Q. B. 627.) This latter form of limitation, which is good, it seems, also in the case of easements newly created (*see Rex* v. *Kemp*, Ld. Raym. 49; *and* Strahan's Conv. Part IV. Sect. III.), is called a *desultory limitation*. (*Earl of Bedford's Case*, 7 Rep. 7.) In the third place, a leasehold interest being a contractual right as against the freeholder, it ceases to be enforceable when the freehold becomes vested in its owner. Not merely so; being only a contractual right as to the land, it is regarded as less of an interest therein than the smallest share of the actual ownership—of the freehold. Accordingly, the largest leasehold is in law less than the smallest freehold, and when a leasehold and freehold are vested in the same person the leasehold, on a principle applicable to all interests in land, is *merged* or absorbed in the freehold. (*See infra, p.* 89.) In the fourth place, the view that tenancies for a time certain are merely contractual rights takes them out of the rule against perpetuities as far as a condition to determine them is concerned. As we have seen, it is illegal to attach to a fee simple a condition that may determine it unless such condition must happen, if it ever happens, within a life or lives in being and twenty-one years. No such principle applies to personal contracts (*Borland's Trustee* v. *Steel Brothers, Limited,* (1901) 1 Ch. 279), and accordingly no such principle applies to leases, at any rate when the condition is one which, as the phrase is, "runs with the land" (*Muller* v. *Trafford,* (1901) 1 Ch. at p. 61); that is, a condition or covenant relating to the land or anything upon it.(1) (*See infra, p.* 252.)

There are other chattel interests in land besides tenancies for a time certain. These, however, are of little importance. The only one of these created by contract, like a tenancy for a time certain, is that very precarious interest, a tenancy at will. (*See infra, p.* 102.) Then there is that even more shadowy interest called a tenancy by sufferance. (*See infra, p.* 103.) But besides these, there are interests for uncertain periods of more substance, though not as a rule of very frequent occurrence at the present day. These are:—(1) Tenancies by *elegit, i.e.*, the tenancy which a judgment creditor has who has obtained.

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[1] Though a condition to determine a lease is not subject to the rule against perpetuities, an option given in a lease to purchase the freehold is. (*Worthing Corporation* v. *Heather,* (1906) 2 Ch. 532.)

the possession of his debtor's land in execution of his judgment. His tenancy continues until the debt is satisfied. (2) Tenancies by executors when the owner of freehold land leaves it, by his will, to his executors for the payment of his debts. (3) Tenancies by statutes merchant and statutes staple. (Co. Litt. 42 a; 2 Bl. Com. 161.) All these, save the first, are now obsolete.

(a) *Tenancy for a Time Certain.*

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Tenancies for a Time Certain.—By a tenancy for a time certain is meant a tenancy for a period either ascertained or capable of being ascertained before the commencement or during the continuance of the tenancy. The reverse of a freehold interest in this respect, there must be some definite period beyond which it cannot extend. Just as the maximum duration of a freehold interest must be fixed by the fall of events, so the maximum of duration of a tenancy for a time certain must be fixed by the parties to its creation. Thus, a lease for a week, or for a month, or for a year, or for any number of years from any given date, is a good lease, because, from the first, the period for which each is to last is fixed and certain. So is a lease for as many years as A. shall name, for here the period for which the lease is to continue is capable of being made certain by A. stating the number of years. (Co. Litt. 45 b.) But a lease for as many years as A. shall live is, from its inception, void, because the period for which it is to continue can only be ascertained on A.'s death, when the lease itself shall be determined. (2 Bl. Com. 143.) Practically a lease for as many years as A. shall live can be given by limiting to A. a lease for a hundred years should A. live so long. (Co. Litt. 45 b.) Here the maximum duration of the lease is certain, though by a collateral condition it may be determined before it would expire by effluxion of time.

Kinds of such Tenancies.—Tenancies for a time certain are roughly of two kinds. The first may be called a general letting. It is a letting for some definite period, but it is not intended to come to an end then, but is to continue until it is duly determined by notice from landlord or tenant. The other may be called a specific letting, or a lease for a term. It is a lease for a definite period and no more: it comes to an end on the expiration of that period without notice of any kind.

General Letting.—A general letting may be by the day, week, month or year. The notice required to determine it is often settled expressly at the time of letting, but if it is not so settled it is determined by custom. The customary notice required on a letting by the week or month is a week or month. Where the letting is by the year—a tenancy from year to year, as it is usually called—the customary notice in ordinary lettings is a half-year's notice expiring with the current year of the tenancy. When the tenancy commenced on one of the usual quarter days, the notice should be given on or before the quarter day ending the first half of the tenancy year; but if the tenancy begins on any other day, a notice of 183 days expiring with the last day of the tenancy year should be given. (*Morgan* v. *Davies*, 3 C. P. D. 360.) In the case of lettings of agricultural land, the proper notice is a year's notice expiring in the same way. (Agricultural Holdings Act, 1883, s. 33; in Ireland, Notice to Quit Act, 1876.) In both cases where the tenant enters between the usual quarter days and there is no express agreement as to when the tenancy is to commence, it must be taken to commence either on the day of entry or on the following quarter day, and the notice given, to be valid, must expire on one of those days. (*Sidebotham* v. *Holland*, (1895) 1 Q. B. 378; *Simmons* v. *Underwood*, 76 L. T. 777.)

For the peculiar incidents attached by modern legislation to lettings from year to year of agricultural land in Ireland, the reader is referred to Appendix B.

Terms.—Specific lettings for a definite period are in practice seldom met with except for periods of not less than several years: they are therefore usually called terms of years. But there is no reason in principle why there should not be a definite letting for a month or a quarter—indeed the letting of rooms in the poorer kind of lodging-houses is always a definite letting for one night—and when the letting is a definite one the same principle applies, however long or short the term.

But, as said, the specific lettings a lawyer meets with in actual practice are usually terms of years. These terms may be divided into two kinds. The first might be called *conditional terms*, since they are terms created for the purpose of securing some collateral object and conditioned to determine when that object is secured. The second might be called *absolute terms*, since they are terms created to continue to their natural expiration and are intended to give the lessee security of occupation till then.

Conditional Terms.—What I have called conditional terms are most frequently met with now in marriage settlements for the purpose of securing the payment of money charged upon the settled land, as, for example, portions for the younger children of the marriage.[1] The land is settled on the first tenant for his life, then a term is granted to trustees to raise portions, and subject to this the land is settled on the eldest son of the first tenant.[1] (*See* Strahan's Convey. pp. 146 and 171.)

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[1] Formerly it was very usual to create mortgages of fees simple by means of a grant of a long lease to the mortgagee without rent reserved. The object was that on the death of the mortgagee the

In terms created for the purpose of securing or raising money, there usually is, as has been said, a provision to determine, or, as it is called, a *proviso for cesser, i.e.*, a proviso that they shall determine when their object is accomplished. Sometimes, however, the term was kept alive after its purpose was fulfilled, and then it was assigned to attend the inheritance, *i.e.*, it was assigned to trustees to hold in trust for the benefit of the owner of the inheritance in the land (if it had been assigned to the owner himself, it would have merged in his freehold). (*See p.* 89, *infra.*) The object of this was, that in case of sale of the inheritance, the term, if assigned to trustees for the purchaser, would protect him against any rentcharge created by any owner of the inheritance since the term was granted. Now, however, by the Satisfied Terms Act, 1845, for the future all satisfied terms, that is, terms the purposes of which have been fulfilled, are, immediately on becoming attendant on the inheritance, to determine (*see In re Moore & Hulm's Contract*, (1912) 2 Ch. 105); but as to such as become attendant on the inheritance before the 1st January, 1846, they, while determining on 31st December, 1845, are still to afford every person the same protection as if they still existed, and were held in trust to attend the inheritance. (*Anderson* v. *Pignet*, L. R. 8 Ch. Ap. 180.)

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right to the debt and the right to reconvey the land might both vest in his executors or administrators. This is no longer necessary. (Con. Act, 1881, s. 30; *and* Strahan's Convey. Part V. Sect. I.

[1] Terms for raising money also arise sometimes under the powers given by sect. 44 of the Conveyancing Act, 1881, to persons entitled to annual sums charged upon land. The exercise of these powers has now the effect of creating terms in substitution of the old terms vested in trustees of settlements to secure pin-money, jointures and annuities generally. (*See* Strahan's Convey. Part IV. Sect. III.

It is evident that a long term, say of 1,000 years, subject to a nominal rent or to no rent at all, is, for all practical purposes, equivalent to the fee simple of the land. A power to convert such a long term into fee simple is given by sect. 65 of the Conveyancing Act, 1881, as amended by sect. 11 of the Conveyancing Act, 1882. By these statutes, a term originally of not less than 300 years, 200 of which are still unexpired, may, by a deed executed by the lessee and declaring to that effect, be enlarged into a fee simple provided (1) that the term was not subject to any rent of money value; (2) nor to any trust or right of redemption on behalf of the freeholder; (3) nor to any right of re-entry on behalf of the freeholder for condition broken; (4) and provided where it was created out of a superior term—was, in other words, a sub-lease—the superior term was itself capable of being enlarged. All trusts, limitations, &c. affecting the term are to apply to the fee simple. (*See* Strahan's Convey. Part IV. Sect. III.)

Absolute Terms.—Conditional terms are undoubtedly chattels real, and must be ranked with other leaseholds, yet it is scarcely accurate to call them "lettings." At any rate, most of the points we are now to discuss with regard to tenancies for a time certain or leases seldom arise except in relation to what we have called absolute terms and general lettings.

In principle there is no difference between absolute terms and general lettings save as to the point of notice. In practice, however, there are usually many marked differences. This arises from the fact that usually general lettings are made very informally—not infrequently without writing—while leases for terms are drawn up in formal deeds which set out elaborately all the conditions and covenants upon and subject to which the leases are granted. With this reservation what we shall now say will apply equally to leases and general lettings.

Determination of Lease.—Though a lease usually determines by effluxion of time, yet it may come to an end before the period fixed for its determination. This premature determination arises most commonly from the surrender of the lease, its merger, or its forfeiture.

(a) *Surrender* is either surrender in fact or surrender in law. Surrender in fact means simply the giving up by the lessee of his interest under the lease to his lessor. Surrender in law takes place when the tenant consents to any act inconsistent with the continuance of his tenancy. Accepting another lease dating from the present time is such an act, and so is consenting to another lease being granted to a third person, but only if followed by the tenant giving up possession of the land to the new lessee. (*Nickells* v. *Atherstone*, 10 Q. B. 944; *Wallis* v. *Hands*, (1893) 2 Ch. 75.) And from a recent decision it would appear that the consent of the tenant to a lease to a stranger may, if such lease is to commence from a future date, operate as a surrender in law even though the tenant does not give up possession. In such a case the Court, it would seem, will regard the transaction as an immediate surrender of the lease by the tenant, and the acceptance by him of a new lease to determine at the date when the lease to the stranger is to commence; *sed quære*. (*Fenner* v. *Blake*, (1900) 1 Q. B. 427.)

By the Real Property Act, 1845, s. 3, a surrender in writing of any interest in land which is not a copyhold interest, and which could not be created by parol, is to be void except it is made by deed. (*See* Strahan's Convey. p. 40.) In Ireland, surrenders may be made by writing not under seal. (Landlord and Tenant Act, 1860, s. 7.)

(b) *Merger* arises where a greater and a less estate in the same parcel of land meet in one and the same person without any intermediate estate. (2 Bl. Com. 177.) In such case the lesser estate is merged or absorbed into the larger. Thus, if A. have a lease for years, and any freehold interest in possession comes to him, the lease for years is absorbed or merged in the freehold. And if A.'s leasehold is granted out of a longer leasehold, and A. buys the longer leasehold, that is, the reversion on his interest, the latter is merged in the former; but there is no merger where the lessee in possession obtains another lease to commence immediately on the determination of that in possession. (*Lewis* v. *Baker*, (1905) 1 Ch. 46.) And similarly, if a life tenant obtains the reversion in fee on his life estate, the latter becomes merged in the former. An exception occurs in the case of fees tail. The same person can have at the same time a fee tail and the immediate reversion in fee simple on it in the same parcel of land without merger resulting, this being due to the operation of the statute *De Donis*, the provisions of which would be rendered ineffectual in such cases if merger resulted. (2 Rep. 61; 8 Rep. 74.)

At law merger takes place only when both interests are held in the same right. (*In re Radcliffe, Radcliffe* v. *Bewes*, (1892) 1 Ch. 227.) Thus, if A. holds a larger interest in Blackacre in his own right, and a smaller interest in Blackacre in right of his wife, there is no merger. But as the common law took no cognizance of trusts affecting land, it was not necessary that both interests should be held in beneficial ownership. Thus, if A. held one interest in Blackacre absolutely, and another interest in Blackacre as trustee for another, this did not prevent merger at law. In equity, however, there was no merger in such cases. Nor was there a merger in equity where it was plainly shown that no merger was intended by the parties (*In re Fletcher*, (1917) 1 Ch. 339); or where it was against the interests of the parties that there should be merger. (*Ingle* v. *Vaughan-Jenkins*, (1900) 2 Ch. 368.) And now by the Judicature Act, 1873, s. 25, sub-s. 4, there is to be no merger henceforth at law where there is none in equity. (*Snow* v. *Boycott*, (1892) 3 Ch. 110.)

(c) *Forfeiture.*—The payment of the rent reserved and the observance of the covenants and conditions contained in the lease are usually secured by a proviso for re-entry by the lessor on the land leased on the non-payment of the rent, or on breach of condition or covenant by the lessee. On such re-entry the lease ceases or determines.

Formerly, a proviso of re-entry was destroyed by (a) the lessor actually waiving the right—that is, expressly refusing to take advantage of the right of re-entry when the chance occurred; (b) his giving his licence to do an act which, without his licence, would cause a forfeiture; (c) the severance of the reversion to which the right of re-entry belonged—that is, the dividing between two or more of the estate in reversion which would come into possession by the exercise of the right. By Lord St. Leonards' Acts, 1859, ss. 1—3, and 1860, s. 6, and by the Conveyancing Act, 1881, s. 12, the law is altered. Now, a waiver is to apply only to the particular breach actually waived, the licence is to apply only to the particular act actually licensed, and on the reversion being severed the conditions of all kinds are to be apportioned between the persons among whom the reversion is divided, and the right of re-entry is to attach to each part of the reversion. (Sect. 12, Conveyancing Act, 1881.) This latter provision only applies, however, to leases made after the commencement of the Act (1st January, 1882). As to leases made before that, conditions of re-entry for non-payment of rent, or other reservation, alone survive the severance of the reversion. (Lord St. Leonards' Act, 1859, s. 3.)

Relief against forfeiture can now in most cases be obtained. Where the forfeiture is for non-payment of rent, the tenant can stop the proceedings for ejectment by paying the rent due with costs before the judgment, or can obtain relief by paying these within six months after judgment. (Common Law Procedure Act, 1852, ss. 210, 212.) There is no forfeiture for non-payment of rent except demand is expressly made for it on the last day on which it is payable, unless the lease expressly provides otherwise, or except half a year's rent is due, and there is no sufficient distress on the premises. (*Id.* sect. 210.)

Where the forfeiture is not for non-payment of rent, sect. 14 of the Conveyancing Act, 1881, applies. Under it a lessor, before bringing an action of ejectment for breach of condition, must serve the lessee with a notice requiring, where remedy is possible, that the lessee shall remedy the breach, and claiming compensation in any case. (As to form of notice, *see Fox* v. *Jolly*, (1916) A. C. 1.) After serving such notice (*In re Riggs*, *Ex parte Lovell*, (1901) 2 K. B. 16), if the lessee does not remedy the breach or pay satisfactory compensation, the lessor can bring an action of ejectment, and at the hearing of it the Court may grant relief from forfeiture to the lessee or refuse it, and if it grant it, it can do so on terms as to costs, compensation, &c. If, however, the lessee does not apply for relief at the hearing, none can subsequently be given. (*Rogers* v. *Rice*, (1892) 2 Ch. 170.) Sect. 14 does not apply to covenants against assigning and sub-letting, or to covenants for the inspection of mines, or the books or weighing machines of mines. No relief can be granted on breach of any of these covenants. It has even been held in the case of a covenant against assigning without the lessor's consent, such consent not to be unreasonably withheld, that the Court could not relieve against a forfeiture incurred through the lessee assigning without asking the lessor's leave, even where if he had asked for it the lessor would not reasonably have refused it. (*Barrow* v. *Isaacs*, (1891) 1 Q. B. 417.) Nor does it apply to conditions forfeiting the lease on the lessee becoming bankrupt, or having his interest taken in execution. (Sub-sect. 6.) Forfeiture under a condition forfeiting the lease in case of bankruptcy or execution is now provided for by sect. 2 of the Conveyancing Act, 1892. That section provides (sub-sect. 2) that relief against forfeiture in such cases may be given under sect. 14 until a year after the execution or bankruptcy, and if the lessee's interest be meanwhile sold relief may be henceforth given at any time. This enactment, however, does not apply (sub-sect. 3) to leases of agricultural or pastoral land, of mines or minerals, of public-houses or beer-houses, of furnished dwelling-houses, or of any property where personal qualification on the part of the lessee is important. In all these cases there is no relief. But by sect. 4 of the same Act, in all cases of forfeiture under a covenant or condition in a lease, the Court may, on the application of a sub-lessee, order the forfeited lease to vest in such sub-lessee for the term of his sub-lease on such conditions as it thinks proper. (*Wardens of Cholmeley School, Highgate* v. *Sewell*, (1894) 2 Q. B. 906.) Thus the sub-lessee may obtain relief denied to the lessee; but the Court will exercise its jurisdiction with great caution, and only give such relief where the sub-lessee was blameless in the matter. (*Imray* v. *Oakshette*, (1897) 2 Q. B. 218; but see *Hurd* v. *Whaley*, (1918) 1 K. B. 448.) And he can obtain relief where the head lease was forfeited not for breach of a covenant within sect. 14, but for breach of the covenant to pay the rent. (*Gray* v. *Bonsall*, (1904) 1 K. B. 601.)

Finally by sect. 3 of the Conveyancing Act, 1892, where there is a condition in a lease against the lessee assigning without the lessor's consent, the lessor is prohibited from exacting a fine or sum of money in the nature of a fine for giving his license to assign. As to what will constitute a breach of this section, see and cf. *Jenkins* v. *Price*, (1907) 2 Ch. 229, and *Andrew* v. *Bridgman*, (1907) 1 K. B. 494.

Incidents of Leaseholds.—The incidents of leaseholds, like those of tenancies for life, are usually regulated by the instrument creating the estate. When they are not, they are much the same as those which the common law attaches to a life estate.

(a) *Waste.*—The lessee is liable for voluntary but not for permissive waste, unless made liable for the latter by the terms of the lease. (*Davies* v. *Davies*, 38 Ch. D. 499, cannot now be considered to be good law: see *In re Cartwright*, 41 Ch. D. 532; and cf. *Re Arbitration between Parry and Hopkin*, (1900) 1 Ch. 160.)

In Ireland, certain acts on the part of a tenant are made statutory waste by sects. 26—31 of the Landlord and Tenant Act, 1860, and by sect. 35 of the same Act justices of the peace are empowered to issue precepts to restrain the commission of these acts.

Like the tenant for life, a lessee is entitled to estovers.

(b) *Emblements.*—Where the lessee held under a lessor who possessed an uncertain interest—such as an estate for life—and his lease was determinable on the determination of such interest, the lessee was, on such determination between seed time and harvest, entitled to emblements. (*See supra, p.* 66.) Now where he is tenant at a rack rent, he is to hold on the land till the end of the current year of his tenancy on the same terms as regards the new landlord as those under which he held from the deceased landlord. At the end of the current year the tenancy expires without notice on either side. (Emblements Act, 1851, s. 1.)

(c) *Fixtures.*—By fixtures were originally meant chattels which were so annexed to the soil as to become in the eye of the law part of it, and which were on that ground not removable by the tenant on the expiration of his tenancy. Now the word means the precise reverse. It means "articles which were originally personal chattels, and which, although they have been annexed to the freehold by a temporary occupier, are nevertheless removable and of course saleable at the will of the person who has annexed them." (*Hallen* v. *Runder*, 1 C. M. & R. 266.) The mode in which this transformation of meaning occurred is well stated by Martin, B., in *Elliott* v. *Bishop* (10 Ex. 496, at p. 507). "The old rule," he says, "laid down in the old books is that, if the tenant or the occupier of a house or land annex anything to the freehold, neither he nor his representatives can afterwards take it away, the maxim being, '*Quicquid plantatur solo, solo cedit.*' (*Minshull* v. *Lloyd*, 2 M. & W. 450.) But as society progressed, and tenants for lives or for terms of years of houses, for the more convenient or luxurious occupation of them, or for the purposes of trade, affixed valuable and expensive articles to the freehold, the injustice of denying the tenant the right to remove them at his pleasure, and deeming such things practically forfeited to the owner of the fee simple by the mere annexation, became apparent to all; and there long ago sprang up a right, sanctioned and supported both by Courts of law and equity, in the temporary owner or occupier of real property or his representative, to disannex and remove certain articles, although annexed by him to the freehold."[1]

The history of the relaxation of the stringent old rule that whatever was annexed to the soil became parcel of the soil, and subject accordingly to the same ownership as the soil, is an interesting illustration of the social influences which have done so much to mould the law of England into its present shape. England was always a commercial nation in which the merchant class held great power. Accordingly, as might be expected, the first relaxation of the rule was with regard to trade fixtures. (*Lawton* v. *Lawton*, 3 Atk. 13.) Now, when a house is let expressly for the purpose of carrying on a trade, all trade machinery affixed by the tenant remains his property, unless it is expressly covenanted in the lease that it shall belong to the landlord. (*Per* Vaughan Williams,

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[1] "Annexed to the soil" and "annexed to the freehold" are often used loosely as equivalent phrases; but they are in effect very different. A fixture nowadays is a chattel annexed to the soil, but not to the freehold. By "annexed to the freehold" is meant annexed to the fee or ownership of the soil; that is, so annexed to the soil as to be regarded in law as part of the soil.

For the effect of a surrender of the head lease on a sub-tenant's right to fixtures, *see Leschalles* v. *Woolf*, (1908) 1 Ch. 641.

L. J., in *Lambourn* v. *McLellan*, (1903) 2 Ch. 268, at p. 227.)

Then during the eighteenth and nineteenth centuries the middle classes acquired much wealth, and with it the power which wealth brings. The middle classes were those who most frequently became the lessees of houses, and who spent money in adding fixtures to such houses, for, in the words of Martin, B. (*supra*), "the more convenient or luxurious occupation of them," and naturally it was with respect to them that the next relaxation of the rule took place. (*Grymes* v. *Boweren*, 6 Bing. 437.)

But it is to be observed that Martin, B., says nothing about fixtures for agricultural purposes being saved to the tenant. In fact, the Courts never interfered for their protection (*Elwes* v. *Mawe*, 3 East, 38), though *à priori* such fixtures seem to be precisely in the same position as trade fixtures. The reason of the difference, of course, consisted in the fact that landowners until very recently had the predominant influence, social and political. It was not until recent democratic times that the tenant of agricultural lands had the old rule relaxed in his favour, and when it was relaxed it was relaxed not by the Courts but by the Legislature, and to this day the "trade fixtures" of a farmer, as they might be called, are not in the technical sense fixtures at all.[1]

The law with regard to agricultural fixtures now depends primarily on sect. 34 of the Agricultural Holdings Act, 1883, as amended by sect. 4 of the Agricultural Holdings Act, 1900. By that section as so amended, when any tenant of agricultural land or of a market garden (Market Gardeners' Compensation Act, 1895) affixes to his land, or at the commencement of his tenancy pays, in pursuance of the Act, the outgoing tenant for, any engine, machinery, fencing, or other fixture, not so affixed in pursuance of an obligation to the landlord, he may, on the determination of his tenancy, or within a reasonable time afterwards, remove it, provided (1) he first pays all rent and performs all other his obligations to his landlord, (2) gives his landlord a calendar month's notice of his intention to remove it, (3) and his landlord does not elect to take it at its value to an incoming tenant. (*See Mears* v. *Callender*, (1901) 2 Ch. 388; and *In re Hulse, Beattie* v. *Hulse*, (1905) 1 Ch. 106.)

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[1] In the same way in Ireland agricultural fixtures are protected as improvements; *see* Appendix B.

The mere fact that chattels have been attached to the land for purposes of trade, or for the more convenient enjoyment of the land, is not in itself enough to make them merely fixtures, and therefore removable by the tenant. They may be so attached as to annex them to the freehold, no matter for what purpose they were attached. Thus it has never been contended that a store-house erected in connection with a shop or manufactory is a fixture. As regards, however, machinery and such like, it seems that they will be held fixtures unless they are so annexed to the buildings on the land as to be irremovable except by the destruction of such buildings. (*Lawton* v. *Lawton*, *supra*.) And as to chattels affixed for the convenient enjoyment of a house or land, the quantum of the annexation seemed formerly to be the sole test of whether or not they could be regarded as fixtures, with the result that very delicate and even ridiculous distinctions sometimes decided the question. (*See Viscount Hill* v. *Bullock*, (1897) 2 Ch. 482.) It has been established now that this is not the sole test, though it is a consideration which must have much weight in deciding the point. The real test is whether the chattel, judging from the mode in which it is affixed, and all the surrounding circumstances, was affixed by the tenant to be enjoyed as a chattel, or to constitute an improvement of the house or land of which he was tenant. (*Leigh* v. *Taylor*, (1902) A. C. 157; cf. *In re Whaley*, (1908) 1 Ch. 615.)

(d) *Rent.*—Another incident of a leasehold is rent.

The amount of rent to be paid is practically always fixed by the agreement creating the tenancy. Where, however, it is not so fixed, the lessee is liable for the use and occupation of the land leased, unless it is clear from the words of the lease or otherwise that it was intended that no rent should be paid. When the rent is expressly reserved, it need not be a money payment. It may be any form of profit except a profit which is part of the land, or, as it is called, a *profit à prendre*. That is regarded in law, not as a rent, but as an exception of a part of the land from the lease. (2 Bl. Com. 41.) In practice, however, rents reserved now are always fixed money payments to be made at certain periods.

The chief remedies for non-payment of rent are by action to enforce payment, distress, and forfeiture of lease. With the last of these remedies we have already dealt. As to the first, an action lies on the contract of leasing for any rent reserved in the lease, whether or not there is a covenant to pay such rent. A covenant to pay is, however, usually inserted in leases, because it renders the lessee liable personally for the rent throughout the existence of the term, even if he parts with, or, as the technical expression is, assigns, the term to another person. Whether there is or is not a covenant to pay rent, the assignee of the term is liable as assignee to pay any rent reserved in the lease only so long as he is in possession of the land. As soon as he assigns the lease his liability ends. This arises from the fact that he has made no contract to pay the rent; he is merely liable to pay it by what is called privity of estate, and as soon as the privity of estate comes to an end, so does his liability for further rent.[1]

Distress is a remedy given by the common law for a rent service—that is, a rent arising out of the relation of landlord and tenant. At common law it could be levied only during the continuance of the tenancy out of which the rent arose; but it was enacted by 8 Anne, c. 14, ss. 6, 7, that in case of any tenant who continues in possession of the land after his tenancy has determined, distress may be made on the land at any time within six months after such determination.

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[1] In assignments of leases there is always inserted a covenant by the assignee to pay the rent. This makes him liable to the assignor (*i.e.*, the original lessee) to do so, but does not impose on him any liability to the lessor unless the latter is a party to the assignment.

The remedy by distress consists at common law of a right to enter on the land and seize any goods thereon, whether belonging to the tenant or not. Originally the lessor could not sell the goods seized; he took them as a "revenge" (as the Statutes of Marlbridge, 1267, call it) for his unpaid rent, and was entitled merely to impound them until such rent was paid. It was not until 1689 that he acquired the right to sell goods taken in distress to satisfy the rent. (2 W. & M. sess. 1, c. 5.) And originally, too, the landlord could himself, or by his agents, enter and make distress. Now, however, by statutes commencing with the Statute of Marlbridge distresses can be levied only by sworn officers of the Court (*see Perring & Co.* v. *Emerson*, (1906) 1 K. B. 1); though no legal proceedings are even now necessary to obtain issue of a warrant to distrain. In this respect the remedy by distress is a survival from the times when a man enforced his legal rights not through the medium of the Courts but by his own action.

As has been said, at common law all goods on the land leased are liable to be taken by distress, whether they belong to the tenant or not; but now by the Law of Distress Amendment Act, 1908, goods not belonging to the lessee are, subject to many exceptions, protected from distress. At common law there are also exceptions even when the goods belong to the lessee. These are, in the first place, goods (*a*) annexed to the land, (*b*) delivered by their owner to the tenant to be dealt with in the way of his trade, (*c*) in actual use at the time of the distress, (*d*) and such things as cannot be restored to the owner in the condition they were at the time of seizure, such as butcher's meat. These things are said to be absolutely privileged, while beasts of the plough and instruments of husbandry, and the instruments of a man's trade or profession are conditionally privileged—that is, they cannot be seized and sold if there are other distrainable goods sufficient to satisfy the rent. (*Simpson* v. *Hartopp*, 1 Sm. Lead. Cas.)

These common law rules as to what may be distrained have been considerably altered by statute. In the first place, growing crops, though annexed to the soil, are since 1737 distrainable (11 Geo. II. c. 19, s. 8); as are since 1689 sheaves of corn, though they cannot be restored in the condition in which they were when seized. (2 W. & M. sess. 1, c. 5.) Again, under the Lodgers' Goods Protection Act, 1871, as amended by the Law of Distress Amendment Act, 1908, a lodger's or under-tenant's goods or furniture cannot be seized and sold for arrears of rent due from the landlord to the superior landlord, provided the lodger pays over to the latter any rent he owes or may owe to his landlord. And by the Agricultural Holdings Act, 1883, s. 45, in the case of agricultural land, a similar privilege is conferred on the owner of "live stock taken in by the tenant of a holding to be fed at a fair price," such owner being entitled to redeem such stock if distrained by payment of price, if any, due to the tenant for feeding the stock. And by sect. 4 of the Law of Distress Amendment Act, 1888, goods protected from seizure in execution under the County Courts Act, 1846, s. 96, are to be exempt from distress, save where the interest of the tenant has expired, and demand for possession has been made and distress has been levied not earlier than seven days after such demand. Under the County Courts Act, 1846, s. 96, which is repealed and re-enacted by sect. 147 of the County Courts Act, 1888, the wearing apparel and bedding of a judgment debtor and his family, and the tools and implements of his trade to the value of five pounds, are protected from seizure in execution. (*See Lavell* v. *Richings*, (1906) 1 K. B. 480.) The Law of Distress Amendment Act, 1888, extends this exemption to distresses for rent, and further regulates the mode in which, and the persons by whom, distresses shall be levied. It does not apply to Ireland or Scotland. The Law of Distress Amendment Act, 1895, s. 4, gives a remedy for unlawful distress in a court of summary jurisdiction—that is, before magistrates in petty sessions. As to the difference between a distress and an execution, *see Jones* v. *Biernstein* (1889), 1 Q. B. 470; (1900) 1 Q. B. 100.

In Ireland, an exemption from distress of the lessee's apparel, bedding, and tools to the same extent as that created by the Law of Distress Amendment Act, 1888, is made by the Law of Distress and Small Debts (Ireland) Act, 1888, s. 5, and by that Act, as amended by the Law of Distress and Small Debts (Ireland) Act, 1893, special provision is made as to distresses for rent where the amount due and distrained for does not exceed 20*l.*, and the protection given by the Law of Distress Amendment Act, 1908, extends only to tenancies within a municipality or township. (Sect. 10.)

(e) *Alienation.*—By the general law, leaseholds may be freely alienated or assigned, provided there is no condition in the lease making them forfeitable on their assignment without the consent of the lessor. Such a condition, however, may be, and frequently is, inserted in leases, and when inserted, being a covenant or condition that runs with the land, it may be attached to the leasehold during its whole duration, however long that may be. Such a condition, however, does not apply to an alienation by operation of law, as in the case of the death or bankruptcy of the lessee. A condition making leaseholds forfeitable on bankruptcy is, however, perfectly legal, and indeed a common condition in leases.

It is to be noted in this connection that a condition of forfeiture on alienation is not technically a restraint on alienation. A restraint on alienation, strictly speaking, is a condition which does not divest the owner of his property on his attempting to alienate it, but which prevents him from alienating it while permitting him to continue to enjoy it after he has tried to dispose of it. Such a condition cannot be annexed to any interest in English land except by Act of Parliament, or except in the case of ownership by married women.

Leaseholds are also freely alienable by will upon the lessee's death. When freeholds are disposed of by will, they are said to be devised, and the disposition is called a devise. When leaseholds and goods are disposed of by will, they are said to be bequeathed, and the disposition is called a bequest or legacy. Leaseholds, like other personalty, vest, on the death of the lessee, if he has left a will, in his executors in trust for the purposes of his will, or, if he has died intestate, in his administrators appointed by the Court of Probate, who hold them in trust, after payment of his debts, for his next of kin.

(f) *Liability of Leaseholds for Debts.*—Leaseholds can be taken in execution for their owner's debts during his life, and after his death they are, and have always been, liable for his debts in the hands of his executors and administrators, just as if they were ordinary goods.

(b.) *Tenancy at Will.*

Tenancy at Will.—Tenancies at will still exist, although they are not often met with. They arise either by express agreement or by construction of law. Those arising in the latter way are most usual. Thus, when a mortgagor is permitted by the mortgagee to retain possession of the mortgaged land after the execution of the mortgage, he is usually tenant at will of the mortgagee. Again, when a tenant enters upon land in pursuance of an invalid lease for a time certain, he is a tenant at will; and so is a tenant who, with the express assent of his landlord, continues to hold as tenant at will after a valid lease has expired. (*Morgan* v. *Harrison*, (1907) 2 Ch. 137.)

And again, as we shall see, when an equitable owner of land is let into possession of it he is at law nominally the tenant at will of the trustee, who is the legal owner. The Court, however, leans against tenancies at will—that is, it will take advantage of the slightest indication to hold that a tenancy for a time certain was created. The relation between mortgagor and mortgagee, like that between equitable owner and trustee, is peculiar; but in all other cases of tenancies, where there is either an invalid agreement or no agreement at all as to the duration of the tenancy, payment of rent by the week, month, or year is usually sufficient to lead the Court to declare that the tenancy is a weekly, monthly, or yearly tenancy, and not a tenancy at will. (*Dougal* v. *McCarthy*, (1893) 1 Q. B. 736.) A tenancy at will may be determined either by express notice given by either party to the other, or by any act of either party which the law regards as inconsistent with the continuance of a tenancy. Such acts on the part of the lessor as granting a lease for years or a freehold estate in possession, or as entering upon the land to open mines or cut timber, and such acts on the part of the lessee as assigning the tenancy or committing waste, are so regarded by the law. A tenant at will of agricultural land whose tenancy is determined by his landlord between seed time and harvest is entitled to emblements.

(c.) *Tenancy by Sufferance.*

Tenancy by Sufferance.—If a lessee, whether at will or for a time certain, holds over after his interest has determined, he becomes what is called a tenant at or by sufferance. A tenancy by sufferance is defined as the interest—as far as it is a legal interest—which arises where a tenant who obtained possession of the land under a legal title retains possession without leave after his title has ceased. Practically the tenancy amounts to this, that the tenant is not regarded by the law as a trespasser on the land. There can, however, be no tenancy by sufferance when the lessor is the Crown, and in this case any tenant holding over is liable to an action for trespass. (2 Bl. Com. 150.)

A tenant holding over after *receiving* a proper notice to quit in writing from the lessor is made liable, so long as he holds over, to pay at the rate of double the yearly *value* of the land. (4 Geo. II. c. 28, s. 1.) And a tenant holding over after *giving* his lessor either written or parol notice to quit—where parol notice is by the lease sufficient—is liable to pay at the rate of double the rent or sum he should otherwise be liable to pay. (11 Geo. II. c. 19, s. 18.)

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Partial Interests in Leaseholds at Law.—Leaseholds, as has already been explained, are not, properly speaking, things, but merely proprietary rights in things, *i.e.*, in lands. They are, however, regarded by the law as chattels or goods, and so the common law doctrine that there can be nothing but absolute ownership in goods applies to them. No estates or partial interests can, at common law, subsist in leaseholds. Thus, if a term, say of a thousand years, be assigned to A. for life and afterwards to B. and his executors or assigns, the law vests the whole term in A. and treats the remainder to B. as void.

A partial exception to this occurs in the case of limited interests created in leaseholds by will. If a term of a thousand years be bequeathed to A. for life, and afterwards to B., the remainder to B. will be good. The law will regard the whole term as vested absolutely in A., subject, like a determinable fee, to a collateral condition (his death during the continuance of the term), on the fulfilment of which the ownership of the term will shift over to B. During A.'s life B. is regarded as having no interest in the term, but a mere possibility, that is, a chance of obtaining the term. This possibility was inalienable at law except by will. (Wills Act, 1837, s. 3.) It was, however, alienable in equity: and now, by the Real Property Act, 1845, s. 6, an executory and a future interest, and a possibility, coupled with an interest, in any tenements or hereditaments of any tenure may be disposed of by deed. If, in the instance given, there were no limitation over after the life interest of A., then on A.'s death the residue of the term would be undisposed of by the will, and would go like other undisposed of personalty.

A legal tenant for life of leaseholds, as far as the lessor is concerned, is in the position of any other assignee of a lease. (*In re Parry and Hopkin*, (1900) 1 Ch. 160.) He is not liable for permissive waste unless there is a covenant to repair in the lease, and he is liable to pay the rent and to observe the covenants therein. His liability to the testator's estate seems to be the ordinary obligation of an assignee (*see Moule* v. *Garrett*, L. R. 7 Ex. 101) to save his assignor's estate from liability under the lease. (*In re Parry and Hopkin, supra.*) But unless he is made so by the will, he is not liable to his testator's estate to put the leasehold premises in repair so far as these premises were out of repair at the testator's death. (*In re Courtier, Coles* v. *Courtier*, 34 Ch. D. 136.) And he is under no obligation to the person entitled in succession to him to observe the covenants in the lease or to execute repairs.

Partial Interests in Leaseholds in Equity.—This, then, was as far as the law permitted the ownership of leaseholds to be portioned out among successive owners. Equity, however, allowed it to be divided up and successive interests created in it as freely as the law allowed this to be done in freeholds. This it accomplished not by repealing, at any rate nominally, the rule of law, but by turning the absolute owner at law into a trustee for those entitled in equity to the partial interests.

In equity, as in law, leaseholds are personalty, and the rules which govern equitable interests in personalty are the same whether the personalty is leaseholds or goods. These will be treated of in the next section. As to the position of an equitable tenant for life of leaseholds as to waste and the performance of covenants in the lease, see *In re Betty, Betty* v. *Attorney-General*, (1899) 1 Ch. 821.

Settled Land Acts.—It should be remembered that leaseholds are land within the Settled Land Acts, and that the tenant for life has all the powers over them which, as we have seen, he possesses over settled freeholds.

SECTION II.

INTERESTS IN GOODS.

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(a) *At Law.*

Legal Interests.—As has already been said, the common law in theory permitted nothing except absolute ownership in goods. In practice, however, it forbade the ownership to be divided as to duration, but it permitted it to be divided as to use. But it did not recognize the person entitled to the use of the goods for the time being as having any share of the ownership of them. He had simply a *jus in re aliena*—a limited right over a thing which belonged to another. In this respect the hirer of goods is much in the same position as the lessee of lands, and perhaps logically it would be proper to treat here of hiring goods. Hire of goods, however, is merely one form of bailment, and most of the other forms of bailment gave rise to rights in the bailee more akin to easements or servitudes over than interests in land; and on the whole it is perhaps more convenient to treat of all forms of bailment together. (*See infra, p.* 343.)

As in the case of leaseholds, so now in the case of goods, the law recognizes successive interests when these are created by will. At first such successive interests were only recognized by equity in the *use* of the goods bequeathed, the legal ownership remaining in the executors of the will. (2 Bl. Com. 397.) But gradually the Courts of Law came to treat the legatees as the owners. Successive interests in goods then were called *executory bequests*. (*See infra, p.* 174.) And so, as Blackstone says, if a testator now leaves his books or furniture to A. for life and afterwards to B., on the executor assenting to the bequest A. becomes the owner of these subject to their shifting over to B. on A.'s death. (But *cf. Re Percy*, 24 Ch. D. 616, and *see* Theobald on Wills, c. 28.) But of course a fee tail or other heritable estate cannot be created at law in goods which in their nature are not heritable. (*See infra, p.* 110.) Most successive interests in goods arising under wills are still merely equitable interests, but when the enjoyment of them is *in specie* it is of little practical importance now whether they are nominally legal or equitable.

Successive interests in goods most frequently arise through trusts, and are in their nature purely equitable. It is to these that the remainder of this section will be devoted.

(b) *In Equity.*

Operation of Equity.—Equity arose out of the decisions of the Chancellor. (*Supra, p.* 18.) Now the Chancellor, not having any admitted legislative authority, could not expressly repeal a rule of the common law. He had, therefore, when he wished to repeal it, to do so by evading it, and he found an effective means of doing this in the power which his Court possessed to attach—that is, arrest and imprison—for contempt of its authority. Thus, if a person possessed certain rights at common law which the Chancellor thought he should not possess, the Court of Chancery did not—it could not—take these legal rights from him. What it did was either to prohibit him from exercising them or to order him to exercise them in a certain way. If he refused or neglected to obey its direction, it treated his disobedience as a contempt of Court and committed him to prison, where he remained until he purged his contempt—that is, until he obeyed its directions. (1 Rep. 121 b; Strahan's Eq. Book I. Art. V.)

Equitable Interests in Goods.—Two applications of this procedure occur in the case of limitations of partial interests in goods and leaseholds, the latter being, as we have explained, regarded in law as goods. If goods were given to a person for life with remainder over to someone else, at common law the life owner was owner absolutely. Equity regarded this as unjust, but could not alter it expressly. It could, however, alter it practically. It permitted, as it had to do, the legal ownership to remain in the life owner; but it declared him trustee of the goods for the person or persons entitled after him under the gift. It compelled him to make an inventory of the goods given to him (sometimes even to give security for their preservation); and if on his death any of them were missing or destroyed, his estate was liable for their value. The only exception to this rule arises in the case of goods *quæ ipso usu consumuntur*, which are consumed by their use, such as wines, cigars, or breadstuffs. As a limited interest in these would be of no value if at the end of it the partial owner had to hand them over as he received them, equity permits him to use them in the only way they can be used—by consuming them—and refused to recognize any partial or limited interest in them. (*Randall* v. *Russell*, 3 Meriv. 190; and *see Myers* v. *Washbrook*, (1901) 1 K. B. 366.)

As we have seen, partial interests in goods when created by will are now recognized by the common law too (*supra*, *p*. 107); but this distinction when the goods are to be enjoyed *in specie* is now practically of little importance. By sect. 25 of the Judicature Act, 1873, it is enacted that where the rules of equity and law conflict, the rules of equity shall prevail. Henceforth, accordingly, equitable interests in goods will be recognized in Courts of Common Law as well as in the Chancery Division, though they are not thereby made legal interests.

Express Trusts of Goods.—The most usual way in which partial interests in goods are created is by means of trusts. When goods were assigned to persons with a direction that they should hold them for the benefit of other persons in succession, the assignees were, at common law, the absolute owners, and the direction to hold the goods for the benefit of others was void. Equity, however, regarded it as contrary to good faith for the assignees to take advantage of this rule of law. It held that the assignees were in conscience bound to carry out the directions of the assignor, and it insisted on their doing so. It left, as it had to do, the legal ownership of the goods in the assignees, but it declared that they held them in trust for the persons entitled to them under the direction of the assignor. Limitations of goods in this way were called express or declared trusts. (*See* Strahan's Eq. Book II. Sect. I.)

C. *Settlements of Goods.*

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Settlements of Goods.—Express trusts most commonly arise now under marriage settlements. Under these, some of the husband's, and usually all of the wife's, personalty are assigned to certain persons to hold on the trusts set out in the settlement. These trusts generally are of the husband's property to him for life, then wholly or partly to the wife for her life; of the wife's property to her for life without power of anticipation, and then to the husband for life. During their joint lives they have a joint power of appointing the trust funds (subject to their life interest) among their children; and this power, if not exercised by them jointly, survives to the survivor. If not exercised at all, then, if there are children of the marriage, the trust funds go, on the survivor's death, between these equally; if there are no children, the husband's and wife's property go under their respective wills, or, if they die intestate, to their next of kin under the Statutes of Distribution. (*See* Strahan's Convey. Part IV. Sect. IV.)

Under the Apportionment Act, 1870, as between limited owner and remainderman, the income of settled property is considered as accruing from day to day.

Limitation of Interests in Goods.—Goods and leaseholds are not, and cannot be made, heritable. Accordingly, the words "heirs" and "heirs of the body" have no meaning in connection with them. If goods are assigned or bequeathed to a person without words of inheritance or succession, the absolute interest in them vests in him. If they are given to him and his heirs, or to him and the heirs of his body, the effect is the same, though such a gift if made by will may be construed as giving a life estate to the parent with remainder to his children. (Fearne, 371; *Papillon* v. *Voice*, 2 P. Wms. 471.) It is usual to assign goods—when it is desired to transfer the absolute interest—to the assignee "and his executors and assigns," but these latter words are quite unnecessary; they merely describe incidents of the ownership of goods which would attach to that ownership whether they were used or not. (Underhill & Strahan on Wills, p. 218.)

Two points may be noted here in connection with settlements of goods. In the first place, owing to their not being heritable in their nature, goods never can be settled *in specie* on exactly the same limitations as freehold land. As has been pointed out, the usual marriage settlement of land is to bridegroom for life, then to the eldest son of the marriage in tail, and, if that son should die without issue, then to the second son in tail, and so on. Under this settlement, if the eldest son dies without issue before he attains twenty-one, the land must go to the second son, and if he lives over twenty-one, then, unless he bars the entail, it will still go to the second son on the death of the eldest son without issue. As no estate tail can be created in personalty, all that can be done in a settlement of goods or leaseholds is to give, after the life interest to the settlor, an absolute interest to the eldest son. On the birth of an eldest son this interest vests in him, and all remainders fail. The consequence is that on his death without issue the second son does not take as in a limitation of freeholds, but the settled funds are divided among the next of kin of the eldest son. (*See Re Dayrell, Hastie* v. *Dayrell*, (1904) 2 Ch. 496.) This may, to a certain extent, be avoided by making the absolute interest not to vest in the eldest son till he attains twenty-one, that being, as we shall see, the most distant time to which the vesting can be postponed. (*See* Strahan's Convey. Part IV. Sect. II.) In that case, if the eldest son dies before twenty-one, the second son succeeds. (*See In re Fowler*, (1917) 2 Ch. 307.)

The second point to be noted is this: When the thing settled is not to be enjoyed by the beneficiaries *in specie*, the question whether the settlement is to be considered a settlement of personalty or a settlement of realty depends not on the actual nature of the thing settled at the date of the execution of the settlement, but on its nature when the ultimate interest under the settlement is to vest in possession. Thus, freehold land settled on trust to sell and pay the income of the proceeds to A. for life, and on A.'s death to divide the corpus—*i.e.*, the principal or fund itself—between B. and C., will be, from the execution of the settlement, and before any sale has taken place, considered in equity to be not freehold land but money, and therefore personalty. On the other hand, money settled on trust to be invested in the purchase of freehold land to be held to the use of A. for life, and then to A.'s eldest son and his heirs, will be, from the execution of the settlement, and before any land has been purchased, regarded in equity as land. In each case the interests or estates which may be created in the settled property will be those characteristic not of the kind of property settled but of the kind of property into which the settled property is directed to be turned, and the estates so created will have all their ordinary incidents attaching to them. This is, very briefly, what is meant by the equitable doctrine of the conversion, or the notional change of land into money and of money into land. (*Fletcher* v. *Ashburner*, 1 Bro. C. C. 497; 1 W. & T.; *In re Ffennell's Settlement*, (1918) 1 Ch. 91. *See* Strahan's Eq. Book II. Art. 58.

PART III.

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Modes of holding Interests.—Ownership, whether absolute or partial, may be described as normal when it is beneficial, exclusive, immediate and unconditional. Frequently, however, it does not fulfil all these requirements. Thus, a person may own a thing for another or others, as, for example, Blackacre may be held by A. and his heirs in trust for B. for life, and afterwards for B.'s eldest son and his heirs. Here A.'s ownership is not beneficial. Or, again, a person may own a thing with another or others, as, for example, A., B. and C. may have Blackacre vested in them jointly in fee simple. Here A.'s or B.'s or C.'s ownership is not exclusive. Or, again, a person may own a thing after another or others, as, for example, A. may have the fee simple in Blackacre after the determination of B.'s life estate. Here A.'s ownership is not immediate. Or, lastly, a person may own a thing subject to a condition which, in certain events, will transfer the ownership to another or others, as, for example, A. may have the fee simple in Blackacre conveyed to him by B. subject to a proviso that, if B. pays him 10,000*l*. on a certain day, A. shall reconvey the fee simple to B. Here A.'s ownership is not unconditional.

When an interest is held for another or others, it may be said to be held in *trust ownership;* when held with another or others, in *concurrent ownership;* when held after another or others, in *future ownership;* and when held subject to a proviso in favour of another or others, in *conditional ownership*.

Section I.

IN TRUST OWNERSHIP.

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Trust Ownership.—When the legal owner of lands or goods holds them, either by voluntary undertaking on his part or by construction of law, absolutely or partially for the benefit of another or others, he is, in so far as he so holds them, an owner of them on trust, and his property in them is what we have described as trust ownership. (Strahan's Eq. Art. 17.)

History of Trust Ownership.—In speaking of limited interests in goods, we have already had occasion to describe the machinery by which trusts were made effective. A short sketch of their history and growth may now be given.

Trusts were preceded by what in old times were called *uses*. The main characteristic of uses was the same as the main characteristic of trusts—namely, the separation of the beneficial from the legal or technical ownership. This separation in the case of uses, as in the case of trusts, was brought about by the action of the Court of Chancery in recognizing that the legal owner of a thing might not be the person morally entitled to enjoy it. Wherever, in the opinion of the Chancellor, this distinction between the legal and the moral right to the ownership of a thing arose, he interfered for the purpose of protecting and enforcing the moral as against the legal right. He did this, as we have seen, by compelling the legal owner to hold the thing owned for the benefit of the person morally entitled to it.

Wherever this separation took place, the legal or technical ownership, which was the only ownership recognized in the Courts of Common Law, remained subject to all the rules and incidents of the common law. The beneficial ownership, which was the creature of the Court of Chancery, was relieved of all those rules and incidents so far as these appeared to the Court of Chancery to be unjust or inexpedient. (Strahan's Eq. Arts. 10—14.) Thus, fee simple land was not subject to its owner's last will at common law, but the Court of Chancery permitted the use of it to be devised. Again, land could not be given to a religious corporation, according to the common law as strengthened by various statutes; but the Court of Chancery permitted conveyances to be made to feoffees to the use of charitable and religious houses. Again, at common law the seisin of freehold land could never be without an owner; the Court of Chancery disregarded the whole doctrine of seisin as far as uses were concerned, and so introduced limitations of future estates unknown to the common law (*see infra, p.* 163), and at the same time revolutionized conveyancing by dispensing as to uses of, with the proceeding which was necessary at common law for the effective transfer of legal estates in freehold lands, and which was known as *livery of seisin*. (*See infra, p.* 243.)

This greater ease and freedom with which uses could be dealt with made the system so popular, that by Henry VIII.'s time most of the land in England, it has been said, was held by its nominal owners on uses for the benefit of other persons who were practically the real owners. The uncertainty as to the actual ownership of land to which this state of affairs gave rise was regarded by the legislature as a serious evil, and an effort was made to end it. A statute, accordingly, was passed with the object of reuniting the legal and beneficial ownership in lands in the same person or persons. This statute, which is called the Statute of Uses, 1536, enacted that henceforth all lands in the seisin of a trustee for the benefit of another or others should be held and considered to be in the seisin and possession of the person or persons for whose benefit they were held. The object of this enactment was to put the beneficial owner immediately into legal possession of any interest in lands which was held by anyone in trust for him. (*See* Strahan's Convey. Part II. Sect. I.)

The statute, however, from the first failed partially of its object. It referred merely to the case of a trustee being *seised* of lands for another's benefit. Now "seized," as has been already pointed out, applies only to freeholds. Accordingly, the statute did not apply to cases where a trustee was not seized—for instance, where he had vested in him merely a term of years. In the second place, it referred only to *passive* trusts—that is, trusts where the trustee's whole duty was to hold for the benefit of someone else; not to *active* trusts—that is, trusts where the trustee had some active duties to perform, as, for example, to manage the land or to repair and maintain the mansion-house. Soon a decision of the Courts of Common Law (*Tyrrell's Case*, Dyer, 155a; Tudor's R. Pro. Cases) deprived the statute of any little effect it ever had in restraining the creation of trusts. In this decision it was held that there could not be a second use limited upon a first use, and that if such a limitation were attempted the statute would vest the legal estate in the person entitled to the first use, and the second use failed. For example, if Blackacre was conveyed to A. and his heirs, to the use of B. and his heirs, to the use of C. and his heirs, the fee simple in Blackacre would, by force of the statute, vest not in A., but in B., while the use in favour of C. and his heirs, being a use upon a use, would fail, and C., who was the person intended to be benefited, would get nothing. Obviously, this construction frustrated the intentions of the grantor. Again the Chancellor interfered to prevent this result by enforcing the second use, and again passive uses of freehold lands became common. "Uses upon uses" of freehold lands henceforth were called "trusts."

The Statute of Uses had, as we shall see (*infra, pp.* 168 *et seq.*), an enormous effect upon our system of conveyancing, but ultimately it failed altogether to fulfil its real object—that is, to put an end to trusts of lands.

The statute did not apply when the trust estate consisted of goods. Trusts of these have always been enforced since the Chancellor's first interference. The modern system of trusts, however, both of land and goods, did not become settled altogether on its present basis till the Chancellorship of Lord Nottingham, *tempore* Charles II. (*Per* Lord Mansfield, C. J., in *Burgess* v. *Wheate*, 1 Eden, 177.)

Creation of a Trust.—The Court of Chancery now creates a trust, as it formerly created a use, in every case where, in its view, the legal and moral rights to a thing reside in different persons. The separation between the legal and moral right most frequently arises through an express declaration of trust. Thus A. may declare himself trustee of his own goods for the benefit of B., or he may assign them to C., with an express direction that C. should hold them in trust for B. This is what is called a *declared* or *express* trust. (Strahan's Eq. Art. 17.) But the separation between the legal and moral right may arise without any express declaration of trust. An intention to create a trust may be inferred by the Court from circumstances attending the conveyance of the thing. For instance, if lands or goods are assigned, at the desire of a purchaser for value, to a third person who gives no consideration for them—to a *volunteer*, as the phrase is—then, in the absence of anything to show that the purchaser intended to benefit the volunteer, the Court will hold that the latter was intended to be and is merely a trustee for the former. This is an example of a *presumed* or *resulting* trust. (Strahan's Eq. Art. 17.) Both these trusts are based on the intention of the parties to create a trust. But sometimes the law creates a trust where there is no such intention. Thus, if a vendee pays the purchase-money to the vendor before the thing sold has been conveyed to him, then the vendor will be held a trustee for the vendee of the thing sold until conveyance of it is executed. This is an example of a *constructive* trust. (Strahan's Eq. Art. 17.)

Description of a Trust.—To the creation of an express *private* trust—that is, a trust for the benefit of an individual or of individuals, as opposed to a trust for a public or charitable purpose—three parties are necessary; the *settlor*, the *trustee*, and the *cestui que trust*. The settlor is the party who provides the property to be held in trust, and who is entitled to declare the purposes for which it is to be held. The trustee is the party who holds the property in trust, and who carries out the purposes for which it is held by him. The *cestui que trust* is the party for whose benefit the property is held in trust. The property held is called the trust property. The interest of the trustee is called the *legal estate*, and the interest of the *cestui que trust* is called the *beneficial* or *equitable estate*. (Strahan's Eq. Art. 20.)

For the sake of clearness, we have spoken here as if the different parties must be different individuals. But the same individual may fill two or, to a certain extent, all three characters. Thus, for example, a person may declare himself trustee of his own property for his children. Here he fills the two characters of settlor and trustee. Again, for example, a person may declare himself trustee of his own property for his own benefit for life, and then for his children. Here he, in a way, fills all three characters. Again, the different parties need not be single individuals. Indeed, in practice it is usual to appoint two or more persons joint trustees, and as a rule trust property is held for the benefit not of a single individual, but of a class or family of individuals. (Strahan's Eq. Art. 20.)

Both in private and in *public* trusts—*i.e.*, trusts for public purposes—the trustee may be, and sometimes is, not an individual, but a corporation; while in public trusts it frequently happens that there is no specific *cestui que trust* at all, as, for instance, when funds are left for the advancement of some public matter or interest, such as charity or education. In this case the place of *cestui que trust* is taken by the object of the trust. (Strahan's Eq. Art. 77.)

Under the Judicial Trustees Act, 1896, the Court has now power on the application of a person creating or intending to create a trust, or of a trustee or *cestui que trust*, to appoint a judicial trustee, either jointly with any other trustee or as sole trustee, or if sufficient cause be shown, in place of all or any trustees. (Sect. 1 (1).) It may give such a trustee general or special directions in regard to the trust (sect. 1 (4)), and may order certain remuneration to be paid to him out of the trust estate (sect. 1 (5)), and the judicial trustee's accounts will each year be audited and a report upon them made to the Court by auditors appointed under the Act. (Sect. 1 (6).) This Act does not extend to Ireland. (Strahan's Eq. Art. 39.)

By the Public Trustee Act, 1906, which came into operation on 1st January, 1908, a government department has been created for the purpose of discharging the duties of trustees and executors. The head of this department is called the Public Trustee; he is a corporation sole with a seal and perpetual succession. He may be appointed by the settlor either a managing or merely a *custodian* trustee, *i.e.*, one whose sole duty is to hold safely the trust property; and the Court may appoint him a judicial trustee. In the case of small estates (*i.e.*, under £1,000), the Public Trustee may by an order under his seal take over their administration from the existing trustees, and in the case of estates of any size, the existing trustees may with the consent of the Court transfer the trust property to him, and in any administration action the Court may appoint him to administer the estate. The Public Trustee is entitled to charge fees for his services sufficient to cover expenses; and any loss to the trust property through breach of trust to which he was party, is to be borne by the consolidated fund. This Act does not extend to Ireland (*see* Strahan's Eq. Art. 40); but where a part of the property belonging to an English trust is Irish land the Public Trustee is competent to administer it with the other property. (*See In re Ardagh's Estate*, (1914) 1 Ir. R. 5.)

The ordinary administration of trust funds and the appointment of trustees and their powers and duties when appointed, are now regulated, to a very large extent, by the Trustee Acts of 1893 and 1894. (Strahan's Eq. Art. 32.) The discussion of these is not, however, within the scope of this work, and we shall refer to them and to the law of trusts, generally, only so far as it is necessary to do so in order to explain the effect their existence has upon the law of property.

Legal and Equitable Estates.—When land or goods, then, are held in trust, there are two separate and distinct interests subsisting in them—the interest of the trustee and the interest of the *cestui que trust*. The former of these is the legal or technical ownership. A trustee is the legal owner of the trust property, and he can, and he only can, give a good legal title to it to a purchaser. Moreover, he can legally sell or dispose of it to anyone he likes without the consent of the *cestui que trust*, and anyone who purchases from him for value, even although the sale constitutes a breach of trust, has a good title to the property, both at law and in equity, provided he did not know, or did not have reason to suspect, that the trustee in selling was committing a breach of trust. (Strahan's Eq. Art. 9.) If the purchaser had notice of the breach, or if he did not give value, he will take the property subject to the trust, *i.e.*, he will be only a trustee of the property. Of course, where a trustee sells in breach of trust, he is personally liable civilly, and, if the sale be fraudulent, criminally, too, for his act. (Larceny Act, 1861, s. 80.) Moreover, until recently, there was no time limited by statute after which an action for breach of an express trust would not lie against a trustee. Now, however, by the Trustee Act, 1888, s. 8, in all cases save where the breach of trust was fraudulent on the part of the trustee against whom the action is brought (*Thorne* v. *Heard and Marsh*, (1895) A. C. 495), or where the trust property or proceeds of the trust property are retained by such trustee, a *cestui que trust* cannot bring an action for breach of trust except within six years from the time when his interest vested in possession. Thus, if A. is trustee for B. for life and afterwards for B.'s children, and A. commits an innocent breach of trust, if B. wishes to sue A. he must do so within six years from the breach, while on the other hand

B.'s children may sue A. at any time within six years after the death of B. (*See In re Somerset, Somerset* v. *Earl Poulett*, (1894) 1 Ch. 231.) In either of the cases excepted from the operations of the statute the time within which the action may be brought is unlimited still, as far as statute is concerned, though, if the *cestui que trust* fails to take action for a long time after discovering the fraud or breach of trust, the Court may refuse to give him a remedy, on the ground that he has been guilty of laches or negligence. There is, of course, no limitation as to criminal proceedings, but the sanction of the Attorney or Solicitor-General, or of the judge of the Court where the civil proceedings, if any, were heard, is necessary before prosecution. (Larceny Act, 1861, s. 80.)

A further power has been given to the Court to relieve a trustee guilty of a breach of trust by sect. 3 of the Judicial Trustee Act, 1896. By this enactment, if a trustee is personally liable for a breach of trust, but the Court is of opinion that he acted honestly and reasonably, and that he ought fairly to be excused, it may relieve him wholly or partially of his liability. This jurisdiction is intended to be used freely, but the Court must be satisfied that the trustee acted not merely honestly and reasonably in the administration of the trust, but also should fairly be excused, before it will interfere in his favour. (*See In re Mackay*, (1914) 1 Ch. 300; *In re Allsop*, (1914) 1 Ch. 1.) The jurisdiction extends to breaches of trust committed before as well as after the passing of the Act, and to ordinary as well as judicial trustees. (*See* Strahan's Eq. p. 182.) The Act does not extend to Ireland.

The interest of the *cestui que trust*, on the other hand, is, strictly speaking, not ownership at all. Practically, no doubt, it constitutes the real—that is, the beneficial—ownership; but, technically, it is, as between the *cestui que trust* and third persons, only a right against the trustee personally and any other person dealing with the property and aware of the trust. The trustee owns the land, but the Court compels him to use his ownership for the benefit of the *cestui que trust*, and if he refuses to do so, it will attach him for contempt, or will make an order removing him from his position as trustee.

At first, the tendency of the Court of Chancery seems to have been to regard the *cestui que trust's* interest for all purposes merely as a right of action against the trustee. (*See Sir Moyle Finch's Case*, 4 Inst. 86.) Gradually, however, it came to be recognized in equity as property, and then the Court of Chancery treated it, as far as possible, as if it were ordinary property at common law. It permitted it to be dealt with in the same manner as the legal ownership could be dealt with—to be limited out in estates, to be alienated *inter vivos*, to be devised or bequeathed, and to descend to the heir or personal representatives. The principle observed was, and is, that in dealing with equitable interests equity follows the law. (*See* Strahan's Eq. Art. 14.)

Equity follows the Law.—The principle was, in some respects, applied very strictly, but, in others, relaxed or disregarded. Thus, the equitable estate in freehold lands was generally treated, as regards the estates that might be held in it, and as to their incidents and their devolution on death, almost precisely as if it were the legal ownership. It could be entailed or held in fee simple, and on death it went to the heir at common law, or, if the land itself was subject to a custom—such as gavelkind—to the customary heir. On the other hand, equitable interests in leaseholds and goods, while they were treated as personalty for purposes of entail and devolution on death—a fee tail could not be created in them, and on death of their owner intestate they went to his personal representatives—yet, as we have seen, they could be portioned out into limited interests, such as interests for life, and future interests, in a way the common law did not permit the legal ownership to be dealt with. Not only so, but, as we have also seen, by the doctrine of conversion, equitable interests in freehold lands are sometimes treated as if they were interests in goods, and interests in goods as if they were interests in freehold lands. (*See* Strahan's Eq. Arts. 88—92.)

These are not the only points on which equity does not observe its own principle of following the law. Thus, it disregards altogether the doctrine of seisin in regard to equitable interests in freehold land. Accordingly, such interests can be made to commence from a future time independently of the determination or not of previous freehold interests; while a fee simple in them can be made to shift over from one grantee to another on the happening of a given event. (*See infra, p.* 166.) For the same reason, the old common law methods of transferring legal interests in land have no application to equitable interests in it. These latter are in their nature *averrable*, that is, capable of being created by word of mouth, or *parol*, as it is called technically. And originally they could also be assigned or transferred from one owner to another by parol. Now by sect. 10, the Statute of Frauds, 1677, the declaration of trust of land, that is, the creation of equitable interests in it, must be evidenced in writing, signed by the person entitled to declare the trust, *i.e.*, the settlor: and by sect. 9, assignments of equitable interests, whether in lands or goods, must be in writing signed by the party assigning them. The Statute of Frauds, however, cannot be used as a shield for fraud. (Strahan's Eq. Art. 23.) Therefore, if a person gets possession of property on the express understanding that he is to hold it on trust, he will not afterwards be allowed fraudulently to keep the property and refuse to discharge the trust on the ground that such understanding was not evidenced by writing. (*Rochefoucauld* v. *Boustead*, (1897) 1 Ch. 196.) Writing is sufficient, and a deed is not necessary to assign any equitable estate, except in the case of an equitable estate in tail, which, under sect. 40, the Fines and Recoveries

Act, 1833, can be assigned only in the same manner as a legal estate in tail. (*See In re Harvey, Harvey* v. *Harvey*, (1901) 2 Ch. 290.) A trust of goods may still be created by parol. (*McFadden* v. *Jones*, 1 Ph. 153.) In practice, as a rule, the same instruments are used to declare or assign equitable interests of all kinds as are used to grant or convey the corresponding legal interests.

Equitable fees simple, as they were not the subject of tenure, were not liable to escheat, which is an incident of tenure (*infra, p*. 311). On the death of an equitable owner in fee simple intestate and without heirs, the trustee, as *terre tenant*, held the lands discharged from the trust, *i.e.*, for his own benefit. (*Burgess* v. *Wheate*, 1 Eden, 177.) In a trust of goods, however, the Crown was entitled to the goods as *bona vacantia*, goods without an owner. And now by the Intestates Estates Act, 1884, ss. 4 and 7, equitable interests in hereditaments, on the death of their owner intestate and without heirs, are also to go to the Crown. (*See infra, p*. 313.)

Devolution of Legal Estate.—The estate of the trustee was, as we have seen, the legal or technical ownership; and on the trustee's death it devolved according to its nature. If it were held by him jointly with other trustees, it survived to the surviving joint owners. If he were sole trustee, it went under his will; or, if he died intestate, it went, if realty, to his heir; if personalty, to his administrator; in every case it remained liable to the trust. Now, by sect. 30 of the Conveyancing Act, 1881, on the death of a sole trustee, the trust property, whether it be land or goods, and whether the trustee has attempted to devise or bequeath it to others or not, vests in the deceased trustee's personal representatives, that is, in his executors if he have made a will, in his administrators if he have not. (Strahan's Eq. Art. 38.) And now, as far as land in England is concerned, by sect. 1 (1) of the Land Transfer Act, 1897, every kind of real estate, save copyholds, on the death of its owner, devolves in all cases in the first instance to its late owner's personal representatives precisely as if it were goods.

SECTION II.

IN CONCURRENT OWNERSHIP.

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Concurrent Ownership.—Ownership is concurrent when it is vested in two or more persons at the same time. By *person* here is not necessarily meant an individual. An individual is, of course, a person, but a person frequently means two, four, a score, a hundred, or a thousand individuals taken together. Person, or *persona*, represents simply the legal limit, which may be an individual or may be any number of individuals so bound together that the law for its own, or for certain purposes, will regard them as a unit. A number of persons so bound together are said to be incorporated, and are called a corporation. (*See infra, pp.* 357 *et seq.*) The individuals forming the corporation do not own concurrently things belonging to the corporation. Individually they have no ownership in such things whatever. The legal entity, called the corporation, owns them, and it owns them in *severalty:* that is, not in concurrent but in exclusive ownership.

Concurrent ownership is divided into *joint tenancy, coparcenary, tenancy in common,* and *tenancy by entireties.* These different kinds of concurrent ownership differ from one another in many respects; but there is one point upon which they are all the same, and on which they differ from ownership in severalty—namely, land or goods owned in any form of concurrent ownership are owned in undivided shares. However much the concurrent owners differ as to the extent or duration of their interests in the thing owned, they each have joint possession of the whole of it and exclusive possession of no part of it. That is the cardinal distinction between all kinds of concurrent ownership and ownership in severalty. As between the different kinds of concurrent ownership, this point is to be noticed: that while all of them, save tenancy by entireties, may subsist equally in legal and equitable interests, only joint tenancy and tenancy in common can subsist equally in land and goods; coparcenary and tenancy by entireties can subsist only in freehold lands.

Sub-section 1.

JOINT TENANCY.

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Characteristics.—Joint tenancy, whether in land or in goods, always arises by the act of the parties, and never by operation of law, that is, it always arises through an actual gift, grant, or agreement, and never through the descent or devolution of the thing owned on the death of the owner intestate. A grant or bequest to "A. and B." without more, or to "A. and B. jointly," or to "A. and B. during their joint lives," or in any other similar terms, will create a joint tenancy. The chief characteristics of joint tenancy are what are called its fourfold unity and the right of survivorship.

Fourfold Unity.—The fourfold unity consists of *unity of title*, *unity of time*, *unity of interest* and *unity of possession*.

By *unity of title* is meant that the interest of all the joint tenants must arise under the same instrument or out of the same act. For example, if A. conveyed Blackacre to B. and C. jointly, and subsequently C. transferred his interest in the joint estate to D., B. and D. would not be joint tenants, as B.'s title would arise under the first, and D.'s under the second grant. In such a case B. and D. would hold as tenants in common, as we shall shortly see.

By *unity of time* is meant that the interests of all the joint tenants must come into existence at one and the same time. (Co. Litt. 188.) Thus, for example, property cannot be given directly (*inter vivos* at any rate) to A. till he marries, and then to him and his wife jointly, because here A.'s interest would come into existence immediately after the gift, while his wife's would arise later (on her marriage). This rule, however, does not apply to grants made by way of use or trust, or to gifts made by will.

Thus, in the case of freeholds, a grant, for example, to A. and his heirs to the use of B. and his heirs till B. marries, and then to the use of B. and his wife and their heirs jointly, will confer a joint estate on B. and his future wife from their marriage. This estate will, in consequence of the Statute of Uses, 1535, be an estate at law. A gift of goods to trustees on trusts similar to these uses will likewise create a joint tenancy in B. and his future wife from their marriage; but here the joint interest will be equitable.

Again, a gift by will to A. for life, and in case she has children to them as joint tenants on her death, creates a good joint tenancy in A.'s children. On birth, each child will take a joint interest in the property subject to be partially divested to let in other children born later.

(*Kenworthy* v. *Ward*, 11 Ha. 196; *and see* Under. & Stra. on Wills, p. 105.)

By *unity of interest* is meant that the share of each joint owner in the joint ownership must be identical. Thus one joint tenant cannot be entitled to greater rights over the thing owned than any other joint tenant, to use it differently, or obtain a larger share of the income arising out of it. As long as the joint ownership continues, the rights of each joint owner as joint owner must be the same.

One joint tenant, however, may have rights of ownership in the thing owned over and above those he possesses jointly with others. For example, if the interest held jointly be a life estate, he may have the reversion in the joint estate in fee simple in severalty, or if he have an estate for life in severalty, that may be followed by a remainder in fee held by him jointly with others.

It is sometimes said that by unity of interest is meant that the interest of each joint tenant must be of the same duration; *ex. gr.*, one tenant's interest could not be a life estate and another an estate for years. (Co. Litt. 188.) This no doubt is so, since a joint tenancy means an interest held jointly, and here there are (not an interest held jointly, but) two distinct and different interests.

For some reason not very clear, but supposed by some to be connected with this necessity for equality of interest, corporations could not be joint tenants of freehold lands. (Co. Litt. 190 a.) Thus, on a limitation to two corporations jointly, or to a corporation and an individual jointly, the tenancy resulting was not a joint tenancy but a tenancy in common. (Litt. s. 297.) This rule did not apply to joint tenancies of leaseholds or chattels, and the reason given for this seems to limit the application of the rule to corporations sole. (Co. Litt. 190 a.) However this may be, the rule itself is now abolished by the Bodies Corporate (Joint Tenancy) Act, 1899, which enables corporate bodies to hold in joint tenancy any real or personal property which they are capable of holding, as if they were individuals.

By *unity of possession* is meant, that all joint tenants have an equal right to the possession of the thing jointly owned. It follows, as a corollary from this, that no particular joint tenant is entitled to exclusive possession of any part of the thing jointly owned. This is what is meant by the old maxim that joint tenants of freeholds are seized *per my et per tout*, of none and of all, not, as Blackstone (2 Bl. Com. 181) says, "of half and of all." (Co. Litt. 186 a.)

Right of Survivorship.—The most important characteristic of joint tenancy is the right of survivorship, or *jus accrescendi.* When an interest in land or goods is limited to two or more persons jointly, the joint tenants are regarded as one proprietor, and as each tenant dies the whole estate survives to the surviving tenant or tenants until only one tenant remains, who then becomes owner of the interest in severalty. The surviving tenant or tenants are entitled to the whole joint interest on a fellow joint tenant's death, regardless of any devise or bequest of his share which he may have made by his will, or of any rentcharge upon the joint interest which he may have granted during his life, or of any claims of creditors for debts due by him, or of any claim by his widow for dower or jointure, or if the deceased tenant were a woman, of her husband's right to an estate by the curtesy. (*See infra, p.* 314.)

This right of survivorship makes it impossible to limit an estate in tail general in joint tenancy. When freehold land is limited to A. and B. and the heirs of their bodies, the estate that will result depends on whether A. and B. (being unmarried man and woman) are or are not capable of lawful marriage. If they are not capable of marrying —as if they are brother and sister—then they will have a joint estate for life with inheritances in tail in common.

If they are capable of marrying, they will take a joint inheritance in special tail. On a limitation to A., B., and C. in fee simple, or of goods to A., B., and C. simply, the survivor takes the whole property absolutely.[1]

Of course, in every case the right of survivorship obtains only if the joint estate is actually subsisting at the death in question. If *severance*, as it is called, has taken place, from that moment the joint estate is destroyed, and with it the right of survivorship among the joint tenants.

It is a rule, partly recognized in law and fully recognized in equity, that for the benefit of commerce the right of survivorship does not obtain among partners as to property held by them in joint ownership for partnership purposes. (*Lake* v. *Gibson*, 1 Eq. Cas. Ab. 294; 1 W. & T.) By the Partnership Act, 1890, "partnership" is defined as the relationship subsisting between two or more persons carrying on a common business with a view to profit (sect. 1); and "partnership property," as all property, rights, and interests, originally brought into the common stock, or acquired on account of the firm, or in the course of the common business. (Sect. 20.) Property purchased with partnership money is (until the contrary appears) to be deemed to be acquired on account of the firm. (Sect. 21.) Land which has become partnership property is converted—that is, theoretically changed into personalty—as between the partners, their heirs and executors. (Sect. 22; *and see* Strahan's Eq. Arts. 58, 59.) On the decease of a partner all the partnership property survives to the surviving partner or partners, who, however, hold it, subject to the partnership agreement, for the benefit of the deceased partner's executors or administrators after payment of the partnership debts. The right, however, of the executor or administrator is not to any specific part or share of the partnership property, but merely to the value of such share, after all proper deductions. This right gives rise merely to a debt against the surviving partners, who are not in any sense trustees of the deceased partner's share for the benefit of his personal representatives.[1]

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[1] Limitations of joint tenancies are frequently made to the grantees and *the survivor of them*. In the case of life estate, these latter words are mere surplusage, and do not affect the interests given. In the case of fees simple, however, they alter the limitation from a joint estate in fee simple to a joint estate for lives, with a contingent remainder in fee simple to the survivor. (*Quarm* v. *Quarm*, (1892) 1 Q. B. 184.)

Severance of Joint Tenancy.—When the fourfold unity, which, as we have seen, characterizes joint tenancy, is broken in upon, the joint estate is destroyed, and those who were before joint tenants hold henceforth either as tenants in common or tenants in severalty, according as the property remains in their common possession, or is divided up among them. The joint estate is then said to be *severed*.

When joint tenants for life sever, each takes a tenancy in severalty or in common for his own life in his share. As there is no right of survivorship between tenants in common, on the death of one tenant his share goes to the person entitled in reversion, even though the other tenants are living. If the joint tenancy had continued, the reversioner could not have entered upon any part of the property till the death of the last surviving of the joint tenants. Accordingly, severance in such a case is an advantage to the reversioner, and a corresponding disadvantage to the joint tenants. (Co. Litt. 252.)

Severance may be either legal or equitable. Where the severance is legal, the joint estate is for all purposes at an end. Where the severance is merely equitable, only the beneficial interest is severed, the legal estate remaining unaffected.

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[1] But see *In re Holland, Brettell* v. *Holland,* (1907) 2 Ch. 88. A new kind of partnership is introduced by the Limited Partnerships Act, 1907, by which a partner who takes no share in the management of the partnership business may limit his liability to the extent of the capital he puts into the partnership. (*See* Strah. & Old. Partnership, p. 229.)

Severance at Law.—A joint tenancy, where the joint tenants are beneficial owners, may be served either (a) by a partition of the joint estate, or (b) by alienation by one of the joint tenants of his undivided share.

(a) By *partition* is meant the dividing up of the joint estate among the joint tenants, who henceforth hold their individual shares in severalty.

The common law conferred the right on one tenant to claim against the wishes of the other tenants a partition of an estate held in concurrent ownership only when the estate arose by operation of law and not by the act of the parties. As joint tenancies always arise in the latter way, no such right existed in their case. This rule still prevails as to goods held in joint ownership, and so no partition can take place as to them except by the consent of all the joint tenants. (Litt. 290.) As to land, however, besides partition by consent, partition may be obtained under the Partition Acts, 1539, 1540, 1868 and 1876, by any joint tenant without the consent of his co-tenants, by application to the Chancery Division in England, or the Chancery Division or the Landed Estates Court in Ireland, or if the property in question does not exceed 500*l*. in value (in Ireland 30*l*. annual value), by application to the County Court.

Whether the partition takes place by agreement between the joint tenants or by decree of the Court, the joint tenants must mutually convey to one another their allotted shares. This conveyance must be by deed (Real Property Act, 1845, s. 3), and should be not by way of grant but by way of release. (*See infra, p.* 245.) The conveyance should be by release because before partition each tenant was in possession and owner of the whole, and therefore there is no need to convey to the one tenant what was already his, but merely to release the rights of the other tenants over it. When, however, a partition by agreement is made through the Board of Agriculture (which is the usual and cheapest method), no conveyances of any kind are necessary.

By sects. 3 and 4 of the Partition Act, 1868, amended by the Partition Act, 1876, the Court has power to decree a sale with division of the proceeds instead of a partition. The power under sect. 3 is absolutely discretionary, and may be exercised by the Court if it thinks a sale would be beneficial, on the request of anyone interested in the joint estate. Sect. 4, on the other hand, gives parties interested to the extent of a moiety a right to demand a sale instead of a partition unless the Court sees good reason for refusing it. (*Drinkwater* v. *Ratcliffe*, L. R. 20 Eq. 528.) The Court may decree sale of part of the joint estate, and partition of the rest. (*Roebuck* v. *Chadebet*, L. R. 8 Eq. 127.) If a joint tenant who has taken out a summons to partition dies before order made, there is no severance (*In re Wilks, Child* v. *Bulmer*, (1891) 3 Ch. 59), and consequently the whole estate survives to the surviving joint tenants; and when in a partition action a sale is ordered of a joint estate of freehold of which one of the joint tenants is an infant, the infant's share of the proceeds is regarded as realty, and if he dies before coming of age, it devolves as realty. (*In re Norton, Norton* v. *Norton*, (1900) 1 Ch. 101.)

(b) *Alienation* by a joint tenant of his undivided share of the joint property, whether that property be land or goods, causes severance of the joint tenancy. The severance here, however, is not so complete as in the case of partition, since the joint tenants do not become owners in severalty, but owners in common. (*See infra, p.* 140.) If there are more than two joint tenants, and one only alienates, this alienation will not sever the joint tenancy as between the other tenants. These will continue to hold, as between themselves, in joint tenancy; while as between them and the grantee of the alienated share they will hold as tenants in common. (Co. Litt. 189 a.)

Before the Married Women's Property Act, 1882, marriage in the case of a female joint tenant always caused a severance of the joint tenancy, because, if before the marriage she settled her share for her separate use, this necessitated a conveyance of it to the trustees of her marriage settlement, and if she did not settle it, the marriage vested it in her husband. In either case the unity of title was broken in upon and the joint estate determined. Now, marriage, in itself, vests no property of the wife in her husband, and, accordingly, marriage alone will not sever a joint tenancy of which the wife is a tenant. (*Palmer* v. *Rich*, (1897) 1 Ch. 134.)

Severance of joint tenancies in land may also be brought about by merger. Thus, if A. and B. are joint life tenants of Blackacre, then the reversion in fee descends upon A., A.'s life tenancy will merge in the fee, and A. and B.'s interests becoming unequal, the joint tenancy will come to an end. If the reversion had been limited to A. in the same deed or instrument as created the joint estate, there would have been no merger. (2 Bl. Com. 186.)

Severance in Equity.—In consequence of the right of survivorship, which, as we have seen, is incidental to joint ownership, and which equity regards as unfair, equity, as the phrase is, leans against joint tenancies. In the language of Lord Cowper, C., equity regards them as "odious." (*York* v. *Stone*, 1 Salk. 158.) An example of that leaning has been seen already in the case of partnership property. In the same way, on a joint purchase of land, if the purchase-money be advanced by the purchasers in unequal proportions, though they will be joint tenants in law, yet in equity they will be tenants in common. (*Lake* v. *Craddock*, 2 P. Wms. 158; 1 W. & T.) And in the case of mortgages, whether the mortgagees advanced the mortgage money equally or unequally, they will in equity be held tenants in common of the mortgage debt, unless the mortgage deed expressly provides that they are to be joint tenants in law and in equity. (*In re Jackson*, 34 Ch. D. 732.)

Again, in the case of gifts by will to a number or class of persons, though if there be nothing to indicate an intention that the individual devisees or legatees are to take separate interests, equity will regard them as joint tenants, yet it will take advantage of the slightest indication of such an intention to hold them to be tenants in common. Thus, a gift "between," "among," "to be divided between," a certain class will in equity make the gift a gift in tenancy in common. Words of this kind are called "words of severance." (*Attorney-General* v. *Fletcher*, L. R. 13 Eq. 128.)

Again, any agreement between the joint tenants that the joint tenancy is at an end will determine it in equity, but no mere declaration by one joint tenant to which the other joint tenants were in no sense parties will have that effect. (*In re Wilks, Child* v. *Bulmer*, (1891) 3 Ch. 59.) In the same way a covenant to settle covenantor's share in the joint estate will be sufficient to cause severance (*Burnaby* v. *Equitable Reversion Interest Society*, 28 Ch. D. 416), whether such covenant was entered into before or after the joint estate arose. (*In re Hewitt, Hewitt* v. *Hallett*, (1894) 1 Ch. 362.)

User of the Joint Estate.—Joint tenants, as between themselves, are entitled to make what use they like of the thing jointly owned, subject to these two restrictions: that no tenant shall oust, or deprive of possession, any other tenant of the whole or any part of the joint estate; and that no tenant shall commit voluntary, or at any rate, destructive waste of the joint property. As between themselves, they certainly are not liable for mere permissive waste; and if one joint tenant spends money in repairs of the common property, he cannot, during the continuance of the joint tenancy, recover a share of his expenditure from the other joint tenants, unless he had express or implied authority from them to expend the money, or unless the repairs were absolutely necessary for the preservation of the property itself (*Leigh* v. *Dickeson*, 15 Q. B. D. 60), though on a sale or partition of the joint estate the Court will allow him a part of such expenditure in proportion to the extent to which it has increased the value of the shares of the estate of the other joint tenants. (*In re Jones*, *Farringdon* v. *Forrester*, (1893) 2 Ch. 461, at p. 476; *In re Cook's Mortgage*, *Lawledge* v. *Tyndale*, (1896) 1 Ch. 923; *cf*. *Hill* v. *Hickin*, (1897) 2 Ch. 579.) A joint tenant is liable for voluntary waste (Statute of Westminster the Second, 1285), but when that waste consists in the proper working of the estate, it would seem that he is liable only to the extent of rendering an account to his co-tenants of the profits resulting therefrom, and appropriating to his own use no more than his proper share of these. (*Job* v. *Potton*, L. R. 20 Eq. 84.) Under the Judicature Act, 1873 (sect. 34, sub-sect. 3), an order for such account can be obtained in the Chancery Division. (*See* 4 Anne, c. 16, s. 27.)

Trustees Joint Tenants.—Trustees are always made joint tenants of the trust estate. This is because the right of survivorship, being an incident of joint tenancy, prevents complications, and saves expense on the death of one of several trustees, by vesting the whole trust property in the remaining trustees without any act on the part of any one. If the trust property had been held in any other way, the deceased trustee must have devised or bequeathed his share in it to the other trustees, or a reconveyance from the trustee's heir or personal representatives would have been necessary.

SUB-SECTION 2.

COPARCENARY.

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Characteristics.—When two or more persons take an estate as together constituting the heir (Co. Litt. 163) of its deceased owner, they hold that estate in *coparcenary*, and they themselves are called *coparceners* or, more shortly, *parceners*. Two points are to be noted in this definition. In the first, as coparcenary is grounded on heirship, it can only arise by descent, and it can only subsist in estates of inheritance. It cannot, therefore, be created by grant or will (*In re Baker* (1898), W. N. 156 (12)), or subsist over goods, on both of which points it differs from joint tenancy and, as we shall see, from tenancy in common.

Two or more persons may constitute a single heir either:—

(a) Under the common law, where, through the absence of males, females, or the issue of females, inherit. For example, A., an owner of fee simple lands, dies intestate, leaving no son and five daughters; the five daughters will inherit the lands together as his heir. And if one of the daughters be dead, leaving issue, that issue will take their mother's share in coparcenary with the surviving daughters. In the same way, where any class of female relatives, as sisters, aunts, cousins, or their representatives succeed as one heir, they are coparceners of the descended estate.

(b) Under special customs, which make all the males of a certain class a single heir; as gavelkind, for instance, where all the sons succeed together.

As regards the unities, coparcenary is characterised by unity of possession and to a certain extent unity of title—derivation by descent from the same ancestor. There is, however, no unity of interest. The shares of the coparceners may be from the first unequal. Taking the example already given, if B.—one of A.'s five daughters—was dead at A.'s decease, leaving no son, but three daughters, these three daughters would be coparceners with their four aunts, but they would have between them only their mother's share: that is, each of them would only have a fifteenth share, while their aunts would each have a fifth share of the whole estate. Nor is there any unity of time. If one of the four aunts in the last example died intestate after her father's death, her share, if she left issue, would descend to them in coparcenary with the other coparceners; if she left no issue, it would go in coparcenary among the other coparceners.

As there is no unity of interest, there is no right of survivorship in coparcenary. As already indicated, interests in coparcenary on the death of their owner intestate descend precisely as do interests in severalty.

Severance.—As in joint tenancy, severance will result from partition of the whole estate or alienation by one coparcener of her share. In the latter case, the incoming tenant holds as tenant in common with the other coparceners.

Since tenancy in coparcenary always arises by operation of the law and never by the act of the parties, the right of one coparcener to claim a partition of the common property exists at common law. (*See supra, p.* 133.) Littleton enumerates four methods by which partition could be made:—(1) By agreement between the parceners, each to take a determinate part of the land. (2) Partition by a friend, each parcener choosing her share according to age. (3) Partition by the eldest parcener, who then is the last to choose her share. (4) Partition by lot. (Litt.

s. 243 to s. 264.) Some things, however, were not at common law partitionable, such as the mansion-house of the estate. The oldest parcener had a right to it on making compensation to the others, or they all could have it in turns. (Co. Litt. 164.) Now the Partition Act, 1868, with its provisions as to sales in lieu of partition, applies to interests in coparcenary as well as to joint tenancies. Formerly, a partition might be made by parol agreement among the coparceners, but now a deed is necessary. (Real Property Act, 1845, s. 3.) As to the form of the deed, on the alienation by one coparcener of her share to another coparcener, she may convey it either by release, as in the case of a joint tenancy, or by grant, as in the case of a tenancy in common. On a conveyance to a stranger she conveys by grant.

User.—Coparceners are practically in the same position, as to user, waste, and repairs, as other concurrent owners.

SUB-SECTION 3.

TENANCY IN COMMON.

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Characteristics.—Like joint tenancy, tenancy in common, whether in land or goods, never arises by inheritance from an ancestor. The three most usual ways in which it arises are—(a) by express limitation, as "to A. and B. as tenants in common," or by the gift of an undivided share of an estate or fund, as "to A. the half of my farm of Blackacre" (Litt. §299); (b) by severance without partition of a joint tenancy or a coparcenary (Litt. § 309); (c) by construction of law, as in the case of a limitation to A. and B. (brother and sister) and the heirs of their bodies jointly; here A. and B. hold a joint estate for life with estates in tail in common in remainder. Where in a gift joint at law there is a severance in equity, the legal estate remains joint, while the equitable estate becomes a tenancy in common.[1]

Of the four unities which characterise joint tenancy, only one exists in the case of tenancy in common—unity of possession. Tenants in common need not claim under the same instrument or act, they need not have equal undivided shares of the estate in common, and their interests need not have been created at the same time. Neither is there any right of survivorship attached to their interests: on the death of a tenant in common his interest in the common estate is subject to his will, and if he dies intestate it descends to his real or personal representatives according to its nature and tenure precisely as if it were held in severalty.

Severance.—As in tenancy in common the only unity which exists is unity of possession, it follows that the only severance which can take place is by partition of the estate held in common.

The various Partition Acts already referred to apply to tenancy in common equally with joint tenancy. It is only necessary here to add that, in case of a partition, whether voluntary or under the Partition Act, 1868, and whether between the original tenants in common or between some of them and the grantees of the others, the mutual conveyances of the allotted shares should be not by release, but by ordinary conveyance. This is because, though the possession is joint, their interests are several. (Co. Litt. 200 b.)

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[1] Blackstone sums up the different modes in which a tenancy in common may arise very tersely: "Tenancy in common may be created either by the destruction of the two other estates, in joint tenancy and coparcenary, or by special limitation in a deed." (2 Bl. Com. 191.) The bearing of the last three words is not very clear. A tenancy in common may be limited in a will, or any other instrument capable of conveying the property.

User of Estate in Common.—Practically the rights of a tenant in common over the estate in common are the same as those of a joint tenant over the joint estate. And the same is the case as to waste and repairs.

SUB-SECTION 4.

TENANCY BY ENTIRETIES.

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Characteristics.—When a legal estate of freehold was granted or devised to a man and his wife in terms which would have made them joint tenants of it had they not been man and wife, they, as long as they remained man and wife, held it not as joint tenants, but as *tenants by entireties*. Divorce, it would seem, changed the tenancy by entireties into an ordinary joint tenancy. (*Thornley* v. *Thornley*, (1893) 2 Ch. 229.)

Tenancy by entireties is founded on the old common law doctrine that husband and wife are in law only one person. This rendered it impossible for them to be joint tenants. (2 Bl. Com. 181.) And it also accounts for the peculiar characteristics of tenancy by entireties. Thus, each tenant by entireties is seised of the entirety of the estate—that is *per tout*, but not *per my*. Either tenant is unable, during the coverture, to dispose of the estate, or of any part of it, save with the concurrence of the other (*Doe* d. *Freestone* v. *Parratt*, 5 T. R. 652); and if it be not disposed of during their joint lives, it survives, like a joint estate, to the survivor. During the coverture, the husband is entitled to the whole rents and profits.

Married Women's Property Act, 1882.—It seems certain that, since the Married Women's Property Act, 1882, a grant to a husband and wife, not expressly as tenants by entireties, but merely in terms which, had the grantees not been husband and wife, would have made them joint tenants, will now make them simply joint tenants. The wife will, in such case, be entitled to a moiety of the rents and profits for her separate use, and to an account as against the husband. (*Thornley* v. *Thornley*, *supra*.) Whether, however, a grant to them expressly as tenants by entireties would not still create a good tenancy by entireties is doubtful. (*See In re Jupp*, *Jupp* v. *Buckwell*, 39 Ch. D. 148.) The unity of the husband and wife is still recognized to this extent, that in grants to husband and wife and a third person as joint tenants, in the absence of anything in the instrument to the contrary, the husband and wife together take only a moiety between them. (*In re Jupp*, *supra*. *Cf*. *In re Jeffery*, (1914) 1 Ch. 375.)

SECTION III.

IN FUTURE OWNERSHIP.

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Future Ownership.—When a person's interest or share of the ownership in a thing is preceded by another interest or share of the ownership vested in someone else, the former person's interest is future or *in expectancy*. Some such future interests existed at common law; others, again, were the creation of the Court of Chancery; while others owe their origin, at least as legal as opposed to equitable interests, to statute.

SUB-SECTION 1.

FUTURE OWNERSHIP AT COMMON LAW.

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No Future Interests in Goods.—Future ownership, in the sense in which we have defined it, can subsist only in things the ownership of which is capable in law of being divided up among different persons in succession. Now at common law, as we have seen, the ownership of goods could not be so divided up; consequently at common law there could be no future interests in goods. On the other hand, the common law permitted the ownership of land to be divided up into successive periods of duration. Accordingly, at common law there could be future interests in land. And furthermore, when the ownership of land was divided up in this way, all the interests or estates so created, save the one in actual enjoyment, were necessarily future in their nature.

Future Interests in Land.—It is important to remember what we have already referred to—that at common law freehold interests are the only interests which were, or for that matter are, regarded as proprietary interests in land. Fee simple is the full ownership of the land so far as full ownership can subsist in land; fees tail and life estates are parts of the ownership. But at common law terms of years or leases for fixed periods are not regarded as proprietary interests at all; they are mere matters of contract between the owner of the land and the occupier of it. Accordingly, all future interests at common law are necessarily freehold interests, and in limiting them no attention is paid to the existence or non-existence of terms of years or other chattel interests.[1]

Now there are two main doctrines of the common law as to ownership of land which must be clearly apprehended before the principles affecting the creation of future interests can be understood.

1. The first of these—to which we have already referred—lies at the basis of the conception of ownership of anything. It is simply this, that ownership is a *continuous* right. It cannot be created so as to arise at

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[1] It is, perhaps, worth noting that the first example given by Blackstone of a future interest at common law is at common law not a future interest at all, but a fee simple in possession. (Bl. Com. 164.) Nothing shows better the immense service rendered to English law by Fearne in making clear the principles upon which future estates are limited than a perusal of the sixteen pages in which Blackstone treats of remainders, reversions and executory interests.

intervals. Once a thing becomes ownerless for a moment, all previous ownership in it has ceased for ever. It is *res nullius*, and the first person who takes possession of it can keep it against all comers.

In the case of ownership of land, this doctrine was supplemented by two other doctrines. The first of these—also already referred to—was that the ownership of land was a duty as well as a right. An owner of land could not abandon his ownership. In spite of anything he could do, his ownership would remain in him until it was effectively transferred to some one else. *The seisin*, as the phrase is, *must never be without an owner*. And as a corollary from this it was held that any limitation which *might* leave the land without an owner, even for a day, was void *ab initio* from the point where such hiatus in the ownership might occur.

The second supplementary doctrine was that just referred to. The only interests which were recognized by the common law as ownership interests were freehold interests. Now, ownership being a continuous right and being a right that could not be vacant or abandoned, and freehold interests being the only ownership recognized by the law, it follows that if the full ownership is to be divided up, it must be divided up into freehold interests and nothing else, and that each of these freehold interests must be limited to commence without the slightest interval between it and the preceding freehold interest, and that if any interval occurs at any point in the limitation the limitation is from that point void.

Thus, if A., owner in fee simple, limits a life estate to B. from the end of the current year, the limitation is void *ab initio*, because there is an interval preceding the arising of the freehold interest to B. A. is not to part with the land till the end of the year; the interest in him during this period cannot be a freehold interest, since it is to cease at a definite period, and so it is not ownership at common law. If, then, such a limitation had been permitted by the common law, it would be a breach of the doctrine that land may not be for a time without an owner.[1] Again, if A. had limited a life estate to B. to commence from the present, and then to C. for a year after B.'s death, and from the end of that year to D. in fee simple, the fee simple to D. would be bad at common law for the same reason. The interest given C. is not a freehold interest; it is therefore an interval between the two parts of the ownership given by A.'s grant—the life estate to B. and the future fee simple to D. Freehold interests limited to commence after an interval are said to be limited *in futuro*.

The result of all this is that the ownership of land could only be divided up into freehold interests, and that each future interest must arise the moment the one preceding it determined without interval of any kind. Subsequently an addition to this rule was made, by the Courts holding that the future freehold interest must be limited to commence on the *natural* determination of the preceding interest. (*Cogan* v. *Cogan*, Cro. Eliz. 360.) Thus, if land is limited to A. for life, but if he should attempt to alienate his life estate, then such estate is immediately to determine, and on such determination or on the death of A. to B. in fee simple, the fee limited to B. would not be a good limitation at common law, since it may arise *in defeasance of*, as it is called (that is, it may arise so as to put a premature end to), A.'s life estate. (*Blackman* v. *Fysh*, (1892) 3 Ch. 209.) As we shall presently see, such a limitation by will or by way of use would now be perfectly good as an executory limitation.

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[1] Another reason usually given is that freeholds in possession could only be transferred by livery of seisin. There are two replies to this. A freehold to commence in the future is not a freehold in possession. The same rule applies to a freehold interest following a subsisting freehold (*see* next example, *supra*), which has always been transferable without livery. As to these views generally, the reader is referred to Strahan's Convey. pp. 123 *et seq.*, where the rules of limitation are discussed in considerable detail.

The effect of these various doctrines may be summed up in this short rule: *A future freehold interest must be limited to commence immediately on the natural determination of a preceding freehold interest, and if it be limited to commence on any other event or contingency, the limitation is at common law void from its inception.* (5 Rep. 94 b.)

2. The second doctrine of the common law as to the ownership of land is one peculiar to itself. In other systems of law the land is always the thing owned. In English law the right of ownership is itself regarded as a thing owned. When the ownership is parcelled out among a number of persons in succession, each of these is regarded as the owner of his share of it, or, as it is said, of his *interest* in the land. He is in the present enjoyment of that interest, although if some one else owns an interest preceding it, he cannot, till such interest is determined, enjoy the land over which his interest exists. In other words, all interests in law, whether in possession or in expectancy, are present rights, although the exercise of that right may be for the present prevented by the existence of rights in others. (Markby's Elements of Law, 4th ed. p. 163.)

A present right which is at present vested in no one is a contradiction in terms, and as all freehold interests in land are present rights, it follows that they must have present owners. This consideration was formerly held to preclude the limitation of present or future interests to unborn or unascertained persons, since the interests arising under such a limitation must necessarily be without owners until the persons to whom they are limited are born or ascertained. Gradually, however, this view was relaxed. Limitations of future estates to unborn or unascertained grantees were permitted, but such limitations were regarded as creating no present interests in the land, but merely a chance or possibility of future interests. If the grantees were born or ascertained before or at the period when the interest in possession came to an end, they took effect as valid grants; if, however, the grantees were not then born or ascertained, they failed altogether, and the next interest which had present owners came into possession precisely as if the interests to the unborn or unascertained grantees had never been limited. Until the grantees were born or ascertained, the whole ownership or fee simple of the land was made up of the interest in possession and the interests in expectancy which had ascertained owners. Thus, for example, in a limitation to A. for life, then to A.'s eldest son (unborn) in fee tail, with remainder to B. in fee simple, the whole ownership resides in A. and B. until A.'s eldest son comes into existence, when the fee tail, until then ownerless, and therefore not an interest, but merely a possibility of an interest, in the land, vests in him and becomes a real interest. It may be noticed in this connection that a child *en ventre sa mère* is regarded now as in existence so as to prevent the failure of an estate limited to it through the determination of the preceding estates before its birth. Formerly the rule was that a child *en ventre sa mère* was regarded as in existence for the purpose of inheritance, but not for the purpose of purchase. (*Reeves* v. *Long*, 1 Salk. 227.) This rule was altered, however, by the Posthumous Children Act, 1698.

Future interests in land, then, can be limited now to unborn or unascertained persons. The generality of this statement, however, must be restricted by what is called the rule against double possibilities.[1] This rule (which might perhaps be more accurately described as a rule against too great remoteness of limitation) may be thus stated: *After a life estate or an estate tail to a living person, a future freehold interest may be limited to a person unborn at the date of the settlement, but any freehold interest limited after such interest to that unborn person's child or heir is invalid, as are all other interests following such invalid interest.* In other words, the power to limit interests to unborn persons is confined to limitations to unborn or unascertained persons who, if born or ascertained at all, must be born or ascertained during the continuance of the estate in possession. (*Whitby* v. *Mitchell*, 44 Ch. D. 85.) This rule applies not merely to common law estates, but to equitable interests. (See *In re Nash*, (1909) 2 Ch. 450; *In re Clarke*, (1916) 1 Ch. 467.)

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[1] The rule against double possibilities—*potentia propinqua* and *potentia remotissima*—was not confined to this specific case. For example, Blackstone, following Lord Coke, gives as other examples of its operation that it makes void grants to unborn bastards, and to unborn children of particular names, *ex. gr.*, as "to my daughter's son Geoffrey." (2 Rep. 51 b.) As to the first of these, it might be held bad on another ground—as contrary to public policy; and as to the second, if it would nowadays be bad at all, it would be because it is a gift to a specified person, when, as a fact, no such person exists. (Pres. Abst. 128.) Probably

Where the estate in possession is a fee tail, or a life estate determinable on the death of an ascertained person, this is the only rule applicable to legal contingent remainders (*Cole* v. *Sewell*, 4 D. & W. 1; *Perceval* v. *Perceval*, L. R. 9 Eq. 386; *Symes* v. *Symes*, (1896) 1 Ch. 272); but where the estate in possession is a life estate determinable on the death of a person possibly not in existence at the date of the settlement—as, for example, an estate *pur autre vie*, where all the *cestuis que vie* are not born at the date of the settlement—then a legal contingent remainder to be valid must be within the rule against perpetuities. (*See infra, p.* 185; *In re Ashforth's Trusts, Ashforth* v. *Sibley*, (1905) 1 Ch. 535.)

An exception to the rule as to double possibilities is made in the case of limitations arising under wills. If a testator leave a life estate to an unborn person followed by an *estate tail* to such unborn person's eldest son, the

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the rule—as far as it ever had any existence in practice—was merely an attempt to lay down a rule restricting the creation of future estates before the principles controlling the limitation of these were definitely settled.

Court, in order to carry out the testator's intention as far as possible, will read this as giving an estate tail, and not a life estate to the unborn person. Consequently, if the unborn person does not during his life bar the entail, the estate tail on his death will go to his eldest son by descent. This mode of interpretation is called *cy-près*. The doctrine of *cy-près* will not, however, operate to prevent the failure of a series of life estates limited to unborn persons' children. (*Re Richardson*, *Parry* v. *Holmes*, (1904) 1 Ch. 332.)

Rule in Shelley's Case.—The old doctrine of the common law, that every freehold interest in land, whether in possession or expectancy, must at its inception have a certain and existing owner, led to the establishment of a rule of law, which still applies to all limitations of freeholds, whether at common law, by will, or by way of use. That rule is called the *Rule in Shelley's Case*, from its being reported in a famous case of that name in Lord Coke's Reports. It will be best explained by an example.

Take a grant to A. for life, and afterwards to his heirs, or to the heirs of his body. Now, originally, if this grant had been held to mean the grant of a life estate to A., and after the determination of his life estate, of a fee to him who should then be his heir or his heir of the body, then as such person was unascertained, and, perhaps, not born at the date of the grant, and must remain unascertained until A.'s death (as there can be no heir-at-law to a living person), the grant to him would have been void. To prevent this the Courts held that the effect of such a grant was not to limit two estates—a good life estate to A. and a bad fee to his heirs—but to limit one only, and that a fee in possession to A. In other words, they held that the words "heirs" and "heirs of the body" were used in the grant merely to mark out what estate A. was to take, whether fee simple or fee tail—that is, were mere words of limitation, the words "for life and afterwards" being mere surplusage. Not only so, but it was held that the interposing of other freehold interests between the grant to A. for life and the subsequent fee granted to his heirs, or the heirs of the body, made no difference in the construction—that still A. took both the life estate given to himself, and the remainder given to his heirs or his heirs of the body, and that the latter were not grantees at all.

All this is summed up in the rule laid down in *Shelley's Case*. That rule is usually stated thus:—*It is a rule of law when an ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or tail, the words "heirs" or "heirs of the body" are words of limitation of the estate of the ancestor.* (1 Rep. 104 a.)[1]

Taking the rule as thus stated, the following points should be marked. In the first place, the first estate mentioned must be to the ancestor to whose heirs the subsequent fee is given. If the limitation were to A. for life, and afterwards to the heirs of B., the rule would not apply. The heirs of B. would here take the subsequent estate as purchasers—that is, as grantees under the deed. In the second place, the estate limited to the ancestor must be one of freehold, legal or equitable. (*In re Youman's Will*, (1901) 1 Ch. 720.) If a term of years be granted to A., and on its determination a fee simple is given to his heirs—which would be a good limitation if made by will or by way of use (*see infra*, *p.* 173)—there the rule would not apply. On the determination of the lease, A.'s heirs, if A. were then dead, would take as purchasers. In the third place, the grants to the ancestor and to his heirs must be contained in the same instrument. If the life estate to A. were given by a deed of grant, for instance, and the subsequent fee to his heirs were given by will or by a later deed, the rule would not apply: A.'s heirs would again take as purchasers on the death of A. In the fourth place, the second gift may follow the first immediately or mediately—that is, consecutively or with an intervening grant or intervening grants. An instance of this has been already given. In the fifth place, in a limitation by deed at any rate, the second gift must be to the "heirs" or "heirs of the body," of the ancestor, *i.e.*, the gift must use the apt words at common law for limiting an estate of fee simple. In a limitation in a will, however, any other words which, taken with the context, would have the same meaning as words of inheritance have in a deed, would bring such limitation within the rule. (*Van Grutten* v. *Foxwell*, (1897) A. C. 658.) Thus, "issue" or "children" may, under certain circumstances, be read as equivalent to "heirs," or "heirs of the body." (*Roddy* v. *Fitzgerald*, 6 H. L. Cas. 823; *and see Pelham-Clinton* v. *Duke of Newcastle*, (1902) 1 Ch. 34.) But this is not so in limitations by deeds. If, for instance, in a deed, after a life estate to A., the fee were limited to A.'s "eldest son" or his "children," or his "grandchildren," the rule would not apply: the fee would vest in the person or classes described as purchaser or purchasers.

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[1] For a detailed discussion of the rule in *Shelley's Case*, *see* Under. & Strah. Inter. of Wills, pp. 210—215.

It is to be observed that the rule in *Shelley's Case* is a rule of law, not a rule of construction merely. It will apply, then, however clearly it may be shown that the grantor or testator intended to give the ancestor only a life estate and his heirs the fee. In every case the question is not what he intended to give, but whom he meant to take; or, in other words, whom he meant to include under the terms "heirs," or "heirs of the body," or, in a will, any other similar expression. If he meant to include the whole line in succession capable of inheriting, the ancestor takes the fee. (*Pelham-Clinton* v. *Duke of Newcastle, supra.*) If he meant a particular individual or class of individuals (*personæ designatæ*), whether the words occur in a will or deed (*Evans* v. *Evans*, (1892) 2 Ch. 173), the ancestor takes merely a life estate, and the person or persons designated in the instrument take the fee. Whether there is a sufficient indication that the words were meant to refer to designated persons only depends on the terms and general effect of the instrument. But, generally, the rule applies in terms only to "heirs" and "heirs of the body" (*i.e.*, in the plural), and where these words are departed from it is easier to show that the rule does not apply. (*See* Under. & Stra. on Wills, Art. 38.)

The rule applies whether the limitation is by deed or will, or is a direct limitation, or a limitation by way of use; but it does not apply unless the estates given to the ancestor and to his heirs are either both legal or both equitable. (*Collier* v. *McBean*, 34 L. J. Ch. 555.)

Where the rule in *Shelley's Case* does not apply, a grant to a person's "heirs," or "heirs of the body," will vest in them a fee simple or fee tail without additional words of inheritance. Thus, a limitation to A. for life, and afterwards to the heirs of B., would vest in B.'s heir a fee simple in remainder. In case, however, B.'s heir, after succeeding to the estate, died possessed of it intestate, the person who would inherit would be not his heir, but the heir of his ancestor B. (Inheritance Act, 1833, s. 4.)

Kinds of Future Estates.—Future interests at common law are primarily divided into *Reversions* and *Remainders*. A future interest is a reversion when it is the residue of the original estate which remains in the grantor after he has granted a smaller estate than that which he had in possession when the precedent interest or interests were granted; it is a remainder when it is an interest granted out of the original estate at the same time as, but in succession to, a precedent interest. (Co. Litt. 142 a.) Thus, if A., an owner in fee simple, grant B. a life interest, the fee simple in expectancy remaining in A. after the grant is the reversion on B.'s life estate. B.'s estate is called the *particular* estate. If A., by the same instrument, had granted a further life estate to C., to vest in possession on B.'s death, then C.'s interest would have been merely a remainder on B.'s, while the fee simple in expectancy still remaining in A. would have been the reversion on both B. and C.'s life interests, the immediate reversion as to C.'s, the ultimate reversion as to B.'s.

The same future interest may be a reversion as to some precedent interests and a remainder as to others. Thus, if A., an owner in fee simple, grants B. a life estate, and by the same instrument grants C. the fee simple in expectancy on B.'s life estate, C.'s fee simple is a remainder as to B.'s life estate. This is because C.'s fee simple is not the residue of the original estate, but a fresh interest created by the same grant as that creating B.'s life interest. If C. subsequently granted a life estate to D., to vest in possession on B.'s death, then C.'s fee simple in expectancy would be a remainder as to B.'s life estate and a reversion as to D.'s. (1 Prest. Est. 123.)

If, in the above instance, C.'s original fee simple, instead of being granted by the same instrument as B.'s life interest, had been granted by a subsequent instrument, then it would have been the reversion on B.'s life interest, since on the grant of B.'s interest the residue left in A. was the reversion, and its subsequent transfer to C. would not change its nature.

Reversions.—The most important point to be noticed about reversions is that there is a relation of tenure between the owner of the reversion—the reversioner as he is called—and the owner of the precedent interest or particular estate. In other words, the latter holds from, or is the tenant of, the former. And the usual incidents of tenure attach to this relationship. What those incidents are we have already pointed out in the previous part of this work. (*See supra, p.* 19.)

A reversion, as it did not entitle the reversioner to the possession of the land, was regarded as an incorporeal hereditament, and was therefore always alienable by grant. If a rent were reserved on the particular estate, a grant of the reversion carried the rent with it without its being mentioned in the grant. (Co. Litt. 151, 152.) As rent was an incident of the reversion, the right to it was destroyed by anything which destroyed the reversion itself. The most usual mode by which a reversion was destroyed during the continuance of the particular estate was by its merger in a larger interest. For example, A., a tenant for life, grants a term of years to B. Afterwards A. succeeds to the fee. A.'s life estate is merged in the fee, and all the incidents attaching to it were gone. Now, by sect. 9 of the Real Property Act, 1845, when a reversion expectant on a lease of any tenements or hereditaments of any tenure shall be surrendered or merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion, as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease.

It may be remembered that, strictly speaking, there is no reversion on a term of years. The grant of a term of years does not take the freehold out of the grantor, and so at common law he is regarded during its continuance as owner in possession through his lessee. Frequently, however, a lease for years amounts practically to the beneficial ownership of the land for the time being, and in such cases it is customary to talk of freeholds being in reversion on terms of years.

It may be added that common law—as far as it recognized such interests in land—regarded chattel interests as goods, and therefore incapable of being limited to various persons in succession, yet it freely permitted a lessee to create sub-leases—that is, leases for shorter periods than that for which the lessor himself held. The effect of this was to leave in the sub-lessor an interest in the head lease similar to a common law reversion. This interest is usually called a *quasi reversion* on the sub-lease, or simply a reversion.

Remainders.—A remainder being simply a grant to take effect in possession on the natural determination of the particular estate, there is no relation of tenure between the owner of it, or remainderman, as he is called, and the owner of the particular estate. The latter does not hold of the former as the owner of a particular estate holds of the reversioner. Both particular estate and remainder come from the same source—the original estate of their grantor; and both are held of the grantor, unless he has, by his grant, divested himself of all his estate in the land, in which case they are held of his superior lord, or, if he had not a superior lord, then of the Crown as lord paramount. (*See supra, p.* 19.)

Remainders are either vested or contingent. A vested remainder is a remainder of the more ancient kind, that is, one the owner of which is living and ascertained, and which is an actual estate in the land, complete in interest though deferred to the precedent estate in enjoyment. Being complete, it is ready and must continue ready, from its commencement as a vested remainder till its expiration in natural course, to come into possession immediately on the determination of the preceding interest, the existence of which is the only thing which prevents it being complete not merely in interest, but also in enjoyment. It is true it may fail, or, rather, determine before the period arrives, when it would vest in possession, but such determination must arise from its own natural expiration, not from any outside event or contingency. Thus, take a limitation to A. for life and then to B. for life—B. being a living person. If B. predeceases A., his life estate will never become an interest in possession; but as long as B. lives, his estate is ready to come into possession the moment A.'s life estate determines.

Contingent remainders are themselves of two kinds.[1] The first kind are those which are contingent because they have no owners. The second kind are those which are contingent because whether they will ever give rise to estates or not depends on a future event or contingency. Neither kind are complete estates in the land, or indeed, estates at all; they are mere possibilities of future estates. Both kinds are marked by this characteristic which distinguishes them from vested remainders. They are not ready from their commencement to vest in possession on the determination of the preceding estates, or, if so ready at their commencement, they may, before their natural expiration, cease to be ready.

Examples of the first kind of contingent remainders—those which are contingent because they have no owners—occur in the cases already mentioned of limitations to unborn or unascertained persons. Thus, in a limitation to A. for life, and then to his eldest son in tail—A. having, at the date of the settlement, no son—the remainder to the eldest son has no owner till A. has a son born to him. Until then, that remainder is not ready to come into possession. In the same way, in a limitation to A. for life and then to the heirs of B., B. being a living person—the remainder to B.'s heir has no owner until B. dies. (*Nemo est hæres viventis;* Co. Litt. 8 b.) Only then can B.'s heir be ascertained, and, accordingly, till then the remainder is not ready to come into possession.

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[1] Fearne gives a more exhaustive classification of contingent remainders into four kinds. The above is intended merely to draw attention to the primary and radical division, which it is of importance the student should clearly apprehend.

Examples of the second kind of contingent remainders—those which are contingent because whether they will give rise to estates or not depends on a future event or contingency—occur in the cases of limitations of future estates subject to a certain event happening or not happening during the continuance of the precedent estates. Thus, in a limitation to A. for life, and then to B. in tail, provided C.—a person living at the date of the settlement—be not then living, the remainder to B. is not ready to come into possession until C. dies, and if C. does not die before A. it fails altogether. Again, in a limitation to A. for life, and then to B. in tail, provided C. be then living, the remainder to B. is ready from its commencement, and as long as C. lives, to come into possession on the determination of the particular estate, but it may not continue so ready till its natural determination. The natural determination of B.'s remainder would be the death of B. and the failure of his issue, but its readiness to come into possession, and, indeed, the remainder itself, would be brought to an end at any time by C. predeceasing A. If the limitation had been to A. for life, and then to B. in tail, provided B. be then living, B.'s remainder would still have been contingent, since the natural determination of B.'s remainder would be not B.'s death merely, but the failure of his issue also, and the readiness of B.'s remainder to come into possession, and, indeed, the remainder itself, would be liable to come to an end on the death of B. before A., though B. left issue living at his decease. On the other hand, if in this limitation the remainder given to B. had been a mere life estate, it would have been vested, since then, during the continuation of the estate till its natural determination, *i.e.*, B.'s death, it must have continued ready to come into possession immediately on the determination of A.'s life estate.

The chief difference between these two kinds of contingent remainders lies in the fact that the first kind, as long as they remain contingent, cannot have, while the second kind may have, an ascertained owner. The first kind are contingent because they have no existing, or if, perchance, existing, no ascertained owner; the moment they have such an owner they cease to be contingent. The second kind are contingent because they are limited upon a future uncertain event; until that event happens they must remain contingent whether they have—as they usually have—living and ascertained owners or not. This fact, however, does not make them estates in the land. Like the first kind of contingent remainders, the second kind are mere possibilities of future estates, and as such their owner could not alienate them at common law, though he might release them to the reversioner or remainderman. He could, however, alienate them in equity, and now, by sect. 3 of the Wills Act, 1837, he can devise them, and by sect. 6 of the Real Property Act, 1845, he can alienate them by deed. Neither does the existence of an owner make them less liable than ownerless contingent remainders to fail should the prior estate in the land determine before they are ready, or after they have ceased to be ready, to come into possession. So far as the common law is concerned, all contingent remainders must become estates, as distinguished from mere possibilities of estates, either during the continuance of the preceding estate, or immediately on its determination. This is a rule which applies equally to all kinds of contingent remainders.

Failure of Contingent Remainders.—Now the determination of the preceding estate might arise through its natural expiration, or it might be brought about artificially. It might be brought about artificially in various ways. Thus, the owner of the preceding estate might do something which would cause a forfeiture of the life estate, as by levying a fine or suffering a recovery, or by conveying the fee simple tortiously. (1 Rep. 66.) Or he might surrender his interest to the first owner of a vested remainder of inheritance, or he might purchase the first vested remainder of inheritance. In either of these cases, if there was no vested interest between the particular estate and the vested fee in remainder, there was nothing to keep them separate, and therefore the particular estate—if it were less than a fee—merged in the fee in remainder, and was thereby determined and destroyed. The existence of contingent remainders between the particular estate and the vested remainder of inheritance was not sufficient to keep them separate and so prevent merger, as contingent remainders were not estates in the land. Vested interests only, as has already been pointed out, are estates or parts of the ownership, and accordingly, when the vested interest preceding contingent remainders, and the vested fee immediately succeeding them, come in any way to be held by the same person, that person holds the freehold in possession, and the fee immediately in remainder upon it. There is thus nothing to prevent the operation of the rule that where two estates are owned by the same person at the same time, the smaller is merged in the larger.

To prevent the contingent remainders failing through the artificial and premature determination of the preceding freeholds, it was formerly customary in all settlements to grant an estate to trustees, which was to arise on the premature determination of the particular estate and to continue until such period as it would have expired in natural course. Such estates to preserve contingent remainders, as they were called, are now rendered unnecessary by sect. 8 of the Real Property Act, 1845, which enacts that a contingent remainder existing at any time after 31st December, 1844, shall be, and if created before the passing of the Act shall be deemed to have been, capable of taking effect notwithstanding the determination by forfeiture, surrender or merger, of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened.

There were other modes in which the destruction of contingent remainders might have been brought about by the premature destruction of the particular estate; but these have now all become impossible owing to other changes in the law, and we need not here mention them.

The liability of contingent remainders to destruction by the natural expiration of the particular estate or preceding interests has also been practically abolished for the future by the Contingent Remainders Act, 1877. This enactment leaves contingent remainders arising under instruments executed before 2nd August, 1877, still liable to destruction through the natural determination of the preceding interests before such contingent remainders have become vested (*In re Brooke*, (1894) 1 Ch. 43); but as to contingent remainders arising under instruments executed since that date, it abolishes such liability provided the contingent remainders are created in conformity with the rules governing the creation of executory interests.

What these rules are we shall shortly see. One of them is that an executory interest must be limited by will or by way of use, *ex. gr.*, "to A. and his heirs to the use of B. for life, and then to the first son of B. who attains twenty-one." Accordingly, if an interest is limited directly to the grantees—"to B. for life, and then to the first son of B.'s who attains twenty-one"—the Contingent Remainders Act, 1877, does not help it. (*Savil Brothers, Ltd.* v. *Bethell*, (1902) 2 Ch. 532.) (1) Another of the rules is what is called the rule against perpetuities. It prevents the creation of any executory interest which may not vest in possession within a life or lives in being and twenty-one years after. (*Infra, p.* 185.) Accordingly, in a limitation to A. (a bachelor) for life, and afterwards to the first son of A.'s who attained the age of (say) twenty-six, the limitation over to A.'s son would be a (2) contingent remainder not created in conformity with the rules governing the creation of executory interests, since it is an interest which might not become vested in him till more than twenty-one years after A.'s death. It would, therefore, also receive no benefit from the Contingent Remainders Act, 1877. If, when A. died, no son of his had attained the age of twenty-six, the contingent remainder would therefore fail. (*Abbiss* v. *Burney*, 17 Ch. D. 211; *Symes* v. *Symes*, (1896) 1 Ch. 272; cf. *Re Wrightson, Beatie-Wrightson* v. *Thomas*, (1904) 2 Ch. 95.)

SUB-SECTION 2.

FUTURE OWNERSHIP IN EQUITY.

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Equity and the Legal Estate.—With respect to the limitation of future interests in lands, where both the legal and equitable interests were dealt with in the limitation, it may be said broadly that equity never attempted, directly or indirectly, to interfere. If any such limitation failed at law through its violation of the rules of the common law, the Court of Chancery did not endeavour, by the creation of a trust, or in any other way, to render it effectual in equity. But where an instrument dealt only with the equitable interest as separate and distinct from the legal estate in the land, or where it dealt with goods, there the Court of Chancery permitted future interests to be created on different principles from those which, at common law, regulated the creation of future interests. Thus if land were conveyed to persons on limitations not recognized by the common law, these limitations failed, and the grantees under them had no claim to the land, either at law or in equity. But if land or goods were conveyed to persons on limitations good at common law and these persons were directed to hold the land or goods for the benefit of other persons on limitations not recognized by the common law, very often equity would enforce these limitations. Or if the grantor had in him only the equitable interest in the land or goods—as, for example, if he were himself a *cestui que trust*, in which case, as we have seen, the legal estate in the trust property would be in the trustees of the settlement—he might convey that equitable interest on limitations very different from those recognized by the common law.

Equitable future Interests in Goods.—The first point on which equity differed from the common law as to the creation of future interests has already been, perhaps, sufficiently referred to. Equity permitted the equitable ownership of goods to be parcelled out among various persons in succession. Of course all such partial interests, save the one in possession, were future. Equity then permitted the creation of future interests in goods, at least as freely as the common law permitted their creation in land.

Equitable Interest need not have Owner.—The second point on which equity differed from the common law is, as to the need of owners for all existing interests. The common law, as we have seen, insisted that all interests, present or future, should have existing and ascertained owners, and contingent remainders were permitted only on the ground that they were not interests at all, but merely possibilities of interests. Equity, on the other hand, did not insist on the equitable interest, whether in land or in goods, and whether in possession or in reversion, having an existing and ascertained owner. The equitable ownership of land or goods might be in abeyance, and to whom it would ultimately belong might depend on a contingency, or on the future decision of some person or persons.

Equitable Fee Simple divisible into Estates not of Freehold.—A third point on which equity differed from the common law is as to the interests into which a fee simple estate may be divided. The common law, as we have seen, insisted that the legal fee simple could be divided up only into freehold estates. Equity, on the other hand, allowed interests to be created in the equitable fee simple for a fixed period.

From these two differences it follows that the common law rule of limitation, which resulted from these doctrines, did not apply to equitable ownership. A future equitable interest need not be limited to commence on the determination of a precedent equitable interest, and if it be limited to commence on any other event or contingency, the limitation is not necessarily void from its inception. In other words, limitations *in futuro* of equitable interests are not *ipso facto* void. Thus an immediate gift of an equitable interest in land or goods to the first son of A. who shall attain the age of twenty-one is good. Here there may be no owner of the equitable interest in the land or goods for twenty-one years or more after the date of the gift. Until a son of A.'s attains the age of twenty-one, the gift is contingent. Again, a limitation of an equitable interest to A. for life, and after A.'s death to such children of his as shall be alive twenty-one years after A.'s death, is good. Here the gift to A. is immediate, but there must be an interval between the determination of A.'s interest and the vesting of the future interest in his children. That, however, will not render void the limitation in their favour. Again, a limitation to A. for life, and then to such person or persons as A. may by deed or will appoint, is good. Here the future absolute interest has no owner until A. appoints one. If A. dies without making any appointment, then, unless there is a gift over to some one else on default of appointment, the equitable interest results to the settlor, or, if he be dead, to his real or personal representatives, according as the property is land or goods. (*In re Weekes' Settlement*, (1897) 1 Ch. 289.)

Absolute Interest after Absolute Interest.—The third point on which equity differed from the common law was as to the limitation of one absolute interest after another. As has been pointed out, at common law a fee simple could not be followed by any other interest. Even if the fee simple limited was a determinable fee, nothing remained in the grantor after parting with it but a possibility of reverter, which, like other possibilities, was not an estate in the land, and could not be assigned by deed or will. But equity had no such rule as this. It permitted further interests to be limited after a fee simple equitable in land or the absolute equitable interest in goods, provided the fee simple or the absolute interest was given subject to a contingency which might determine it. The only restriction upon this power lay in that imposed on it by the rule which prevented the creation of perpetuities. Thus, a limitation of the equitable ownership of fee simple land to A. and his heirs until A. shall marry, and then to him for life, and subject thereto, to the eldest son of the marriage in fee tail, is good. And in the same way, a limitation of the absolute equitable interest in goods to A.—an infant—but should A. die before attaining the age of twenty-one and without issue, then to B., is good. The latter limitation constantly occurs in settlements of leaseholds or goods to accompany freeholds. (*See Christie* v. *Gosling*, L. R. 1 E. & I. App. 279.)

Equitable Reversions and Remainders.—While equity thus permitted future interests of a different kind, and limited in a different way from those recognized by the common law, yet it did not prevent the creation of equitable reversions and remainders. When the equitable interest in freehold land was so limited that, had the interest dealt with been the legal estate, the future interest resulting would have been good reversions or remainders at common law, then the equitable interests resulting were regarded as equitable reversions or remainders. These equitable reversions and remainders had the same incidents and characteristics as reversions and remainders at common law, with this exception: equitable contingent remainders were not liable to fail through the determination of the particular estate before they were ready to vest. (*Astley* v. *Micklethwait*, 15 Ch. D. 59; Fearne's Contingent Remainders, p. 304.)[1] This is usually explained by saying that the contingent remainder is prevented from failing by the existence of the legal estate in the trustees or mortgagees, or in whomsoever it may reside. This is, however, only another way of saying what has been said above—that, as far as equitable interests are concerned, equity does not insist that an interest in them in possession or in expectancy shall have an existing owner.

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[1] The Land Transfer Act, 1897, now vests all the freeholds of a deceased owner in his personal representatives. It has been held that the interests disposed of by his will are in consequence merely equitable interests, and that accordingly future estates created in them by the will are subject to this rule even after they have been clothed with the legal estate by the executors consenting to the devise. (*In re Robson,* (1916) 1 Ch. 116.)

SUB-SECTION 3.

FUTURE OWNERSHIP UNDER STATUTE.

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Statutory Future Interests.—The third kind of future interests are those arising, directly or indirectly, under or by virtue of certain statutes. These statutory future interests are called executory interests. The rules regulating their creation are practically the same as those regulating the creation of future interests in equity. Executory interests, however, are not merely equitable interests: they are, by force of the statutes in question, legal interests also, that is, they give the grantee not merely the beneficial ownership in the thing they subsist in, but also the legal title to it.

History of Executory Interests.—Executory interests owe their origin to the old system of uses. In uses, as in trusts, as we have seen, the whole ownership of land was divided into two parts—the legal or technical ownership, and the beneficial ownership or use; and the Court of Chancery permitted the latter—just as it subsequently did in the case of trusts—to be dealt with free from the more harassing rules of the common law. Practically, we may assume for present purposes that the beneficial interest in land under a use could be limited in the same way as the equitable interest under a trust can now be limited.

This was the state of affairs when the Statute of Uses, 1535, was passed. That statute, as we have seen, was intended to put an end to the separation of the beneficial interest in land from the legal or technical ownership. It attempted to do this, however, not by preventing the future creation of uses, but by ordaining that the legal ownership of the land should always follow the use. Consequently, uses could be created just as before—that is, on the same principles as apply to future equitable interests—and the moment such uses arose, the Statute of Uses, 1535, clothed them with the legal estate. The effect of this was that henceforth future legal estates in land, provided they were not limited directly to the grantees but by way of use to them, could be created without regard to the common law rule of limitation. Thus, a grant of land to A. and his heirs from the end of the current year was bad as creating a fee simple to commence *in futuro;* but if the grant were an immediate grant to B. and his heirs (B. giving no consideration) *to the use of A. and his heirs*, from the end of the current year, it would be perfectly good. Before the Statute of Uses, B. would have the legal estate in the land as feoffee to uses. These uses would have been, in the first place, a resulting use to the grantor till the end of the current year, and then a use in fee to A. and his heirs. The effect of the statute, however, was to take this legal estate out of B. and make it vest in the persons for the time being entitled to the use of the land. Accordingly, after the statute, the grantor had, under such a settlement, the legal as well as beneficial ownership of the land until the end of the year, when both shifted over from him to the next *cestuis que use*—A. and his heirs. The feoffee to uses, then, was changed by the statute from a trustee into a mere conduit-pipe—as he has been called—for conveying to the *cestuis que use* their respective interests in the land.

Two points in this connection should be remembered. In the first place, as has been pointed out, the statute only applies where the feoffee to uses has been granted a freehold interest in the land. In the second place, it only applies to passive feoffees to uses—to feoffees who have no active duties to perform in carrying out the use. Where they have active duties, the statute does not take the legal estate out of them. They are, in such cases, not called feoffees to uses, but trustees. (*See* generally, Strahan's Convey. pp. 8—13.)

Another effect of the Statute of Uses was to put an end to the power of devising land. As has already been pointed out, land was originally not devisable at common law, but the Chancellor made it practically devisable by permitting the creation of feoffments to the use of the grantor's will. The Statute of Uses, by turning the uses into legal estates, rendered them subject once more to the common law rule. Statutes were, however, soon afterwards passed to prevent this undesirable effect. These were the Statutes of Wills, 1540 and 1542, which made freehold land capable of being devised at law. (*See infra, p.* 272.) The Courts of Common Law, in applying this statute, adopted the practice of the Court of Chancery. The latter had allowed testators, as it had allowed other settlors, to create future interests in the use of land, without regard to the common law rules of limitation. The Courts of Law now allowed the legal estate to be devised in the same way as the Court of Chancery had permitted the use to be devised. Accordingly, the Statute of Wills indirectly resulted, as to grants of land by will (as the Statute of Uses directly resulted as to grants of land by deed), in making it possible to limit future legal estates in land on the principles applicable previously only to the use or equitable interest in the land.

Two points of difference between executory interests arising under deeds and those arising under wills may be noticed. In the first place, executory interests under deeds, to take effect as such, must be limited not directly to the grantees, but by way of use. Executory interests under wills, on the other hand, take effect as such, whether they are limited directly or by way of use. Thus, to give by deed a freehold *in futuro* to A., the limitation should be " to B. and his heirs to the use of A." for life or in fee from the given date; but a limitation by will " to A."

for life or in fee from the given date would be sufficient. In the second place, executory interests under deeds can only be created in freehold land. This is due to the fact that the Statute of Uses applies only to uses of freeholds. On the other hand, executory interests arising under wills may be created in freeholds, leaseholds, or even in chattels. Thus, if a lease for a hundred years be left to A. for life, and afterwards to B., on the executor's assent to the legacy (*see infra, p.* 277), A. will take not a mere equitable, but also the legal, estate in the term subject to the executory limitation over to B., and on A.'s death the legal and equitable interests in the term will immediately vest in B. or his assigns. (*Lampet's Case*, 10 Rep. 46.) This extension of the principles of equitable limitations to future interests in personalty arising under wills was made by the Courts of Law to prevent the defeat of the intentions of testators who might be compelled to make their wills without legal assistance.

Rule of Construction.—Executory interests being interests unknown to the ancient common law, the Common Law Courts have always regarded them with a certain disfavour. This disfavour caused the adoption of the rule that no future interest, though limited by way of use, or arising under a will, is to be regarded as an executory interest unless at its inception it is not reasonably possible to consider it a vested or contingent remainder. In other words, no future interests are to be held executory interests unless they are limited in a manner not recognized by the common law rules of limitation. Thus, future interests in goods or leaseholds arising under wills are executory interests, because the common law did not permit the creation of future interests in goods or leaseholds. Interests in freehold lands limited by way of use or under wills, to commence *in futuro*, or interests in fee limited in the same way to follow determinable interests in fee, are executory interests, because such limitations are unknown to the common law. But where the limitations set out by way of use or under a will are such as might have been validly created at common law, then they must be held to be common law limitations. (*Re Lechmere and Lloyd*, 18 Ch. D. 524.)

Thus, all future freehold interests in land which, though limited by way of use or under a will, are limited to arise on the natural determination of a precedent freehold interest in possession are, under this rule of construction, vested or contingent remainders, and subject to all the common law incidents characteristic of such interests. One of the most important of these incidents is, as we have seen, the liability of contingent remainders to fail in case they are not ready to vest in possession the moment the preceding estate determines. This liability to failure frequently led to fantastic results, and also caused the frustration of the intentions of testators. Thus, say a testator left to A. a life interest in land, and then the fee simple to the first son of A.'s who attained twenty-one. If A. predeceased the testator, then, unless A. had left a son of twenty-one, the future interest to A.'s son would be an interest limited to commence *in futuro* (*i.e.*, without any freehold preceding it), and therefore an executory interest which would arise on a son of A.'s attaining twenty-one. But if A. outlived the testator, then the future interest to A.'s son would, until A. had a son of twenty-one, be a future freehold interest with a preceding freehold interest in possession to support it, and therefore at common law a contingent remainder; and accordingly, if A. died before a son of his attained twenty-one, it would, by the common law rule, fail altogether.[1] To prevent such hardships as these, and also to prevent the failure of contingent remainders generally, the Contingent Remainders Act, 1877, was passed. This Act provides that every contingent remainder created by any instrument executed after the passing of the Act (2nd August, 1877), or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation, had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent shifting use in a deed, or executory devise in a will, without being preceded by any particular estate of freehold.

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[1] It would be different, however, if the will showed that the testator contemplated an interval between the determination of the life estate and the vesting of the fee. Thus, in a limitation to A. for life, and after his death among such of his children who in his lifetime, or after his death, attained twenty-one, in fee simple, the joint fee simple would be an executory devise. (*In*

This statute puts future legal interests limited in a deed by way of use or arising under a will in all respects save one in the same position as future equitable interests. Whether they are executory interests, that is, are limited in such a way as would render them invalid in their inception if they were subject to the common law rules of limitation, or whether they are vested or contingent remainders, that is, are limited in such a way as they might have been validly limited at common law, they are not to fail through the non-existence or premature determination of a preceding estate of freehold. It may be added that in practice all future interests in freehold land arising under deeds are now limited by way of use, while, of course, all arising under wills are within the statute.[1]

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re Lechmere and Lloyd, 18 Ch. D. 524; *Dean* v. *Dean,* (1891) 3 Ch. 150; *Re Wrightson, Beatie-Wrightson* v. *Thomas,* (1904) 2 Ch. 95.)

[1] *See* Strahan's Convey. Part IV. Sect. I.

Kinds of Executory Interests.—Executory interests arising under a deed, and therefore by virtue of the Statute of Uses, are called, according to their nature, *springing* or *shifting uses*. Executory interests in freehold land arising under wills, and therefore by virtue of the Statute of Wills, are called *executory devises*; while executory interests in leaseholds and personalty arising under wills are called *executory bequests*.

By a shifting use is meant a future estate which, by coming into existence, defeats a preceding estate limited by the same instrument. For example, if a fee simple be limited to C. and his heirs to the use of A. and his heirs, but should B., a bachelor, marry, then to the use of B. and his heirs, the use to B. and his heirs would be a shifting use, since its coming into existence as a legal estate must determine the fee simple granted to A. and his heirs. A springing use, on the other hand, is a future estate which is limited to come into existence at some future time without any estate being limited to precede it. For example, if A. limited a freehold interest to C. to the use of B. from the beginning of next year, the use to B. would be a springing use. Till the end of the year, the instrument creating the use would have no practical operation. It is true, the ownership of the land would be technically transferred by it to C., but, as C. gave no value for it, he would be merely a feoffee to uses. The first use would be a resulting use to A., who would be seised as of his old estate till the end of the year, and then an express use would arise in favour of B. The effect of the Statute of Uses on this would be that A.'s interest, legal and equitable, would continue undisturbed till the end of the year, when it would go over to B.

Executory devises may be divided into the same classes as executory uses, in which case the classes are called shifting devises and springing devises. Executory bequests can be similarly divided too; but many executory bequests are rather in the nature of remainders, though, owing to the fact that the things in which they subsist are not such as common law remainders can subsist in, they are executory interests. Thus, in a bequest of a term of years to A. for life, and then to B. absolutely, the interest of B. is neither a springing nor a shifting bequest, and yet it is an executory interest. It is usually described as a quasi-remainder, or, more shortly, a remainder. As to executory bequests of pure personalty, see *In re Thynne*, (1911) 1 Ch. 282, and *In re Swan*, (1915) 1 Ch. 829.

Sub-section 4.

POWERS.

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Nature of Powers.—Under the head of future ownership may be most conveniently discussed what are known as powers. Yet a power can scarcely be considered the ownership, or a part of the ownership, of the thing over which it subsists, since as long as it remains merely a power, it confers no right to share in the possession or use of the thing, either in the present or in the future. It is rather one of the rights into which ownership is divisible—the right of disposition—separated from the other rights. (*See supra, p.* 2.) In other words, it is not an interest in the thing, but an authority to create an interest or interests in it. The interest or interests to be created under the power will, of course, be future interests in the sense that they will arise some time after the grant of the power or authority to create them. The person who gives the authority to create future interests is called the *donor*, the person to whom it is given, the *donee* of the power.

Kinds of Powers.—Powers may be divided into two classes—*common law powers*, and *powers operating by way of trust or use*.

Common law powers are themselves of two kinds. The first are usually called *common law powers, strictly so called*, of which the most ordinary example is the authority to sell his lands which a testator formerly sometimes gave his executors without devising those lands or any interest in them to the executors. (*Dean* v. *Dean*, (1891) 3 Ch. 150.) As regards this authority, it is to be remembered that by the Land Transfer Act, 1897, freehold land in England now vests, like personalty, in the owner's executors, who have the right to sell it to satisfy his debts. (*See infra, p.* 278.) The second kind of common law powers are *statutory powers*, such as the authority given by the Settled Land Act, 1882, to a tenant for life to sell or lease the settled lands.

Powers operating by way of trust or use are powers to declare the trusts or uses of the thing over which they subsist; or, in other words, they consist in an authority to dispose of the beneficial interest in the thing. They are *equitable powers* when the legal estate does not follow the beneficial interest. They are *legal powers* when the legal estate does follow the beneficial interest. This happens when the use declared under the power is executed by the Statute of Uses. As we know, that statute applies only where a freehold interest in land is vested in the feoffee to uses. When this is the case, the power is simply an authority to declare executory interests in the land. Where the thing over which the power subsists is leasehold land or goods, then the power is merely an authority to declare equitable interests which the trustees must recognize.

Powers operating by way of use are most commonly found in disentailing assurances and in settlements of married women's freeholds. When a disentailing assurance is executed by a tenant in tail with a view to a resettlement the land is usually conveyed to the feoffee to uses discharged of the estate tail to hold to such uses as the disentailing tenant shall appoint, and until such appointment to the uses of the original settlement, the new uses being appointed by a subsequent deed. When a married woman's freeholds are settled after the life estates to the married woman and her husband, and the interests given to the children of the marriage, the freeholds are directed to be held in default of children to such uses as the married woman may appoint. The most frequent example of a power operating by way of trust is the ordinary power in a marriage settlement of personalty of appointing the personalty, subject to the husband's and wife's interests therein, among the children of the marriage.

Special and General Powers.—Powers, however arising, are commonly divided into general powers and special powers, according as the authority enjoyed by the donee of the power is to appoint practically to anyone (including the donee himself), or to appoint to a special person or class of persons. (*In re Byron's Settlement, Williams* v. *Mitchell*, (1891) 3 Ch. 474.)

A general power of appointment—unless when it is subject to a trust—is practically equivalent to the ownership of the interest over which it subsists, since the donee can at any moment make himself the actual owner by appointing to himself. (The old common law rule (now repealed) that a person cannot convey to himself or his wife never applied to powers, general or special.) And thus, being able to appoint to himself, the legislature regards him as actual owner, and in several statutes has treated property over which a person has a general power of appointment as part of his estate. Thus, by sect. 13 of the Judgments Act, 1838, any land over which a judgment debtor has "any disposing power which he might without the assent of any other person exercise for his own benefit," may be taken under a writ of *elegit*. Again, on the bankruptcy of the donee of a general power, the power vests in his trustee in bankruptcy, who can exercise it for the benefit of his creditors. (Bankruptcy Act, 1914, s. 38.) And by 3 & 4 Will. IV. c. 104, on the death of a donee of a general power, if that general power be executed by his will, the property appointed becomes assets for the payment of the deceased appointor's debts. By sect. 4 of the Married Women's Property Act, 1882, this provision is extended to the wills of married women. By sect. 27 of the Wills Act, 1837, a general gift of land or goods in a will is to include all land or goods over which the testator had at his death a general power of appointment by will, unless a contrary intention appears from the will. (*See In re Jacob, Mortimer* v. *Mortimer*, (1907) 1 Ch. 445.) By sect. 1 (2) of the Land Transfer Act, 1897, real estate over which a person executes by will a general power of appointment is, as if it were real estate vested in him, to devolve in the first instance in his real representative constituted under that Act. (*See infra, p.* 278.) By sect. 1 of the Infants' Settlement Act, 1855, an infant, if a male, over the age of twenty, and, if a female, over the age of seventeen, can, with the consent of the Court, exercise a general power of appointment for the purpose of settling the property over which it subsists in view of marriage. And by sect. 2 of the same Act, such appointment is not void on the death of the infant under twenty-one, unless the infant was tenant in tail. (*See In re Scott, Scott* v. *Hanbury*, (1891) 1 Ch. 298.)

Special powers of appointment, on the other hand, generally amount less to the beneficial ownership of the thing over which they subsist than to a discretionary authority which the donee of the power may, if he like, exercise in favour of the person or persons who are the objects of the power.

As we have seen, special powers are powers to appoint to a particular person or among a particular class of persons. A power to jointure the donee's wife may be regarded as an example of the first kind of special power.

A power to appoint among the children of the donee may be regarded as an example of the second and more common kind.[1] Powers of this latter kind are usually inserted in marriage settlements, more especially where the settled funds were originally the property of the wife. Roughly, the trusts in such settlements generally are as follows: The trustees are directed to pay the income of the trust funds to the wife for her separate use without power of anticipation during her life; should she predecease her husband, then the income is to be paid to him during his life; on the death of both husband and wife, the trustees are to hold the trust funds for the benefit of the children of the marriage in such shares as the husband and wife jointly, or the survivor of them, shall appoint, and, in default of appointment, to the children in equal shares, with limitations over to the wife in case there are no children. (*See* Strahan's Convey. Part IV. Sect. IV.)

Now formerly, in the case of powers to appoint among a certain class, unless the authority given was to appoint to any or all of them—when the power was called *exclusive*—the donee had to appoint to each member of the class a substantial share, or the appointment would be bad in equity as *illusory*. At law it was a sufficient execution of these non-exclusive powers if some share, however small, was given to each member. By the Illusory Appointments Act, 1830, passed at the suggestion of Lord St. Leonards, the legal rule as to non-exclusive powers was made to prevail over the rule of equity, and henceforth an appointment was good both in law and equity, however small the shares appointed to some members of the class, provided a share was appointed to every one of them. This state of the law has been again altered as to appointments made after the passing of the Act (30th July, 1874), by the Illusory Appointments Act, 1874, which practically makes, in the absence of a direction to the contrary in the instrument creating the power, all powers *exclusive*—that is, gives the donee of the power the right to appoint to one or several members of the class only, excluding altogether the others. As the law now stands, the donee is not bound to appoint a particular or any portion to each member, save only where the instrument creating the power expressly fixes the portion to be appointed to each or any member. (Sect. 2.) The exercise of a special power of appointment cannot be delegated (*In re Joicey*, (1915) 2 Ch. 115); but the donee can covenant not to exercise it in a particular way. (*See In re Evered*, (1910) 2 Ch. 147.)

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[1] Sometimes the class among whom property is to be appointed includes the donee of the special power in which case the donee is entitled to appoint to himself. (*See Taylor* v. *Allhausen*, (1905) 1 Ch. 529.) How far such a power comes within the Acts affecting general powers, set out in the preceding page, will depend on the special wording of each Act.

Usually, in the case of special powers, there is a clause in the instrument creating them declaring that, in default of appointment, the property over which the power subsists shall go to the class among whom it may be appointed in equal shares. But even if such a clause be absent, the Court will imply it where any indication can be gathered from the instrument that it was the settlor's or testator's intention that the gift was for the benefit of the class, and that the donee of the power was merely to have an authority to decide what portion each of such class should take, that is where it is merely a power of selection. (*See In re Green*, (1915) 1 Ir. R. 42.) Where, however, there is no indication of any such intention, no gift to or trust for the class can be implied. (*In re Weekes' Settlement*, (1897) 1 Ch. 289, following *Healy* v. *Donnery*, 3 Ir. C. L. Rep. 213.)

Creation of Powers.—No formal words are necessary in order to grant or reserve powers. All that is necessary is that the grant or reservation should be made clear. And any power granted is presumed to apply to the whole interest of the grantor in the thing over which it is granted, unless a contrary intention is expressed.

Execution of Powers.—As far as the law itself is concerned no formalities are required for the due execution of a power. (*In re Broad, Smith* v. *Draeger*, (1901) 2 Ch. 86.) But where the instrument creating the power requires certain formalities to be observed in executing it, then, in order that the appointment may be valid, the donee in executing the power must strictly observe all the formalities so required. Thus, if the consent of a second person be required by the instrument, that consent must be obtained. If the power is to be extended by deed, it cannot be validly executed by will, and *vice versâ*. (As to what is meant by a will, *see In re Wilkinson's Settlement*, (1917) 1 Ch. 620.) Formerly, if the instrument required that the deed or will appointing should be executed with certain formalities—such, for example, as attestation by three witnesses—these formalities had to be strictly observed; but now it is sufficient if the deed or will, in such cases, be executed in the presence of and attested by two witnesses as deeds and wills usually are executed and attested. (As to deeds, *see* sect. 12, Law of Property Amendment Act, 1859; as to wills, *see* sect. 10, Wills Act, 1837.) If, however, the instrument, without specifying the power to be exercisable by will, declared that it must be executed by a writing "signed, sealed and delivered," then, in order to execute it validly by will, the will must be "signed, sealed, and delivered," notwithstanding the Wills Act. (*Taylor* v. *Meads*, 34 L. J. Ch. 203; *Smith* v. *Adkins*, L. R. 14 Eq. 402; *and see In re Broad, Smith* v. *Draeger*, (1901) 2 Ch. 86.)

As has already been said, a general power of appointment over land or goods exercisable by will is well executed by a general devise or bequest, unless a contrary intention appears either in the will or in the instrument creating the power. (*Re Davies, Davies* v. *Davies*, (1892) 3 Ch. 63.) A special power, on the other hand, is executed only when there is a specific reference in the will either to the power or to the property over which it subsists, or there appears clearly from the will, read in the light of surrounding circumstances, an intention to execute it. (*See In re Sharland*, (1899) 2 Ch. 536; *Beddington* v. *Bauman*, (1903) A. C. 13. As to surrounding circumstances, *see In re Mackenzie*, (1917) 2 Ch. 58.) And the rule applicable to the execution of special powers by will applies to the execution of both general and special powers by deed or other instrument *inter vivos*.

As has also been already said, when the donee of a general power executes such power by will the property appointed becomes part of the testator's estate, and so is liable for the payment of his debts, which it would not be if the power were not executed by the will. (*See Beyfus* v. *Lawley*, (1903) A. C. 411.) Sometimes, where there is a specific appointment which fails owing to the fact that the person in whose favour it was made predeceased the testator, difficult questions arise as to whether or not the power is executed by a general or residuary devise or bequest in the will. It seems to be settled now that the execution is sufficient if it appears from the will that it was the testator's purpose to exercise the power, not merely for the benefit of the deceased appointee, but for all purposes—that is, so as to take the property out of the instrument creating the power altogether. (*In re Boyd, Kelly* v. *Boyd*, (1897) 2 Ch. 232, following *In re de Lusi's Trusts*, 3 L. R. Ir. 232. *And cf. Coxen* v. *Rowland*, (1894) 1 Ch. 406.)

Where there is a defect of a formal character merely in the execution of the power, the Court of Chancery will sometimes treat the execution as good. This is what is called aiding a defective appointment. The Court will aid a defective appointment where the person in favour of whom the appointment is made is (a) a purchaser for value from the appointor; (b) a creditor of the appointor; (c) the wife or child of the appointor; or (d) where the appointment is in favour of a charity. (*See Charlton* v. *Charlton*, (1907) 2 Ch. 523.)

Extinction of Powers.—Powers may be extinguished or determined in various ways—by their complete execution, by the death of the donee of them, by the failure of their objects, by the acquisition by the donee of the full ownership of the land or goods over which they subsist, and by the alienation of the estate or interest over which they subsist, as, for example, by the sale of a settled estate. Whether a power could be extinguished by release formerly depended upon whether it was a *power simply collateral*, or a *power relating to the land*. By a power simply collateral was meant a power vested in a donee who had no interest whatever in the land over which the power subsisted, and who could not exercise the power in his own favour. Such a person was formerly incapable of extinguishing, or even suspending, the power by any act on his part. Now, however, by sect. 52 of the Conveyancing Act, 1881, a person to whom any power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise, the power. A married woman restrained from anticipation is within this enactment. (*In re Chisholm's Settlement, Hemphill* v. *Hemphill*, (1901) 2 Ch. 82.) It does not, however, enable a person to release a limited power where there is a duty on him not to release it—that is, where he is a trustee of it. (*Re Eyre*, 49 L. T. 259.) But where there is no duty not to release it, the mere fact that the donee of the power obtains a benefit personally by releasing the power will not make such a release fraudulent. (*In re Somes, Smith* v. *Somes*, (1896) 1 Ch. 250.) Nor does the receipt of a benefit by the donee in consideration of executing a power make the execution a fraud upon the power unless the benefit is a share in the property appointed or otherwise corrupt. (*Saunders* v. *Shafto*, (1905) 1 Ch. 126.) By sect. 6 of the Conveyancing Act, 1882, the donee of a power is enabled to disclaim it by deed, and thereupon he ceases to be capable of exercising it, while it may be exercised by the other or others, or survivor or survivors of the other or others of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power.

Powers of Revocation.—A power of revocation is, in a sense, the antithesis of a power of appointment. A power of appointment is an authority to create interests; a power of revocation is an authority to determine interests.

Powers of revocation arise in the same way as powers of appointment. They subsist over the use of the thing, and they operate either under the Statute of Uses or in equity, according as their subject-matter is freehold land or not. A power of revocation is usually inserted in voluntary settlements, and a power of partial revocation is often inserted in marriage settlements. Thus, it is almost common form in the case of a marriage settlement of a bride's property to give her power in case of a second marriage to revoke to the extent of a third part of the settled property the trusts declared in the settlement in favour of the children of the then intended marriage. If the power reserved is simply a power to revoke, the exercise of it has the effect of rendering the settlement void to the extent of the revocation. Usually, however, a power of revocation is accompanied by a power of new appointment, and unless there is something to the contrary in the settlement, from the existence there of a power of revocation, a power of new appointment will be implied. (1 Sugd. Pow. 461.) In this case the settlor can revoke the old uses and declare new ones: in other words, he can vary the settlement without nullifying it. But where the revocation and new appointment may be made by will, a mere general devise or bequest will not, by virtue of sect. 27 of the Wills Act, 1837, be taken to be an exercise of the power reserved. (*In re Brace, Welch* v. *Colt,* (1891) 2 Ch. 671.)

It is to be noted that once a power of revocation and new appointment has been executed, the new uses appointed cannot be again revoked, unless a new power of revocation is expressly reserved in the instrument appointing the new uses. (1 Sugd. Pow. 449.)

SUB-SECTION 5.

PERPETUITIES AND ACCUMULATIONS.

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Rule against Perpetuities.—We have already seen how the ancient common law originally insisted that all interests in lands should be vested, that is, should definitely belong to a definite owner, and how that rule was relaxed in the case of contingent remainders. With regard to contingent remainders, however, a restriction was put upon their creation by the doctrine, already stated, as to limitations of remainders to children of persons unborn at the date of the settlement. But this was a common law doctrine, and as such applicable only to legal estates in land. Future interests in goods and executory interests in lands, unknown to the common law, were not affected by it.

The evil, however, which the common law rule was designed to prevent, was just as likely to arise in connection with the new interests as in connection with common law estates; and so, as was to be expected, it soon was found necessary to devise a rule of restriction applicable to them. This was accomplished by an adaptation of the common law rule. The longest period during which, by the most favourable concourse of circumstances, a remainder in land could at common law be rendered inalienable was during the lives of specified persons in being at the date of the settlement and twenty-one years after the dropping of the last life, with an extra period for gestation if gestation actually existed. Thus, in a limitation to A. for life, then to B. for life, then to C. for life, and on the death of the last surviving to his eldest son and his heirs, the remainder would at the utmost—that is, if the last survivor died leaving an only son *en ventre sa mère*—be rendered inalienable during the lives of A., B., and C., and during the minority of the son of the survivor, that is, during a further period of twenty-one years, with some months for gestation—that is, until the last survivor's son came of age. Now, this longest possible period was what the Courts adopted as the utmost period during which an executory interest, or a future equitable interest, in lands or goods could remain contingent or unvested. Any such interest failed if, by the limitation under which it arose, it would not or might not vest during a specified life or lives in being and twenty-one years after, a further period for gestation being allowed if gestation actually existed.[1] (*See Re Wilmer's Trusts, Moore* v. *Wingfield,* (1903) 2 Ch. 411.) This is what is called the rule against perpetuities, and any limitation violating it is said to be void for remoteness.[2]

With regard to this rule, these points should be noted: In the first place, possible, not actual, events are to be considered in determining whether or not any given limitation offends against the rule. Thus, in a limitation to the use of A. (a bachelor) in fee simple until any son of his attains the age of twenty-one, and then to the use of such son, the executory interest is good, because the event which is to vest it must, if it take place at all, take place not later than twenty-one years after A.'s death, a period, if necessary, being allowed for gestation. But, in a similar limitation to A. (a bachelor) in fee simple until a son of his attains the age of twenty-five, the executory interest is bad, because, though one of A.'s sons may attain that age even during A.'s life, yet it is possible at the time the limitation is made that no one may attain it until more than twenty-one years after A.'s death. (*Dungannon* v. *Smith*, 12 Cl. & F. 546.) And the same rule applies when the executory interest is given to a class, the members of which may not be ascertainable till more than twenty-one years after a life or lives in being. (*In re Mervin*, *Mervin* v. *Crossman*, (1891) 3 Ch. 197; *cf. In re Turney*, *Turney* v. *Turney*, (1899) 2 Ch. 739; *and see Re Appleby*, *Walker* v. *Lever*, (1903) 1 Ch. 565.) On the other hand, the twenty-one years after the dropping of a life or lives in being may be taken *in gross*—that is, it may be fixed independently of any person's minority. Thus, a limitation to the use of A. for life, and afterwards to the use of such person as shall, twenty-one years after A.'s death, be the eldest male descendant of A., is good. (*Cadell* v. *Palmer*, 7 Bligh, N. S. 202.) Moreover, if an executory interest be void as violating the rule against perpetuities, all subsequent limitations, though themselves not violating the rule, fail too. (*Hale* v. *Hale*, 3 Ch. D. 643.) Thus, if property be limited to the use of A. (a bachelor) in fee until a son of his attains twenty-five years of age, and then to the use of such son in fee, and in default of such son to the use of B., the limitation to A.'s unborn son being void for remoteness, the limitation over to B., though to a living person, fails too.

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[1] If the lives in being are not specified, the limitation will be void for uncertainty. Thus, a limitation by will of property in trust for a *private* purpose during the lives of "all persons who shall be living at the death" of the testator and for twenty-one years after is void *ab initio* on this ground. (*In re Moore, Prior* v. *Moore,* (1901) 1 Ch. 936.)

[2] In *Re Dean,* 41 Ch. D. 552, a trust for the lives of horses was held not to be void for remoteness.

The rule against perpetuities does not apply to limitations following estates in tail, nor does it apply to limitations over from one charity to another. (*Christ's Hospital* v. *Grainger*, 1 Mac. & G. 460; *In re Tyler*, *Tyler*

v. *Tyler,* (1891) 3 Ch. 252.) It does, however, apply to limitations in favour of an individual in succession to a charity, and in favour of a charity in succession to an individual. (*In re Bowen, Lloyd Phillips* v. *Davis,* (1893) 2 Ch. 491; *cf. Re Blunt's Trusts, Wigan* v. *Clinch,* (1904) 2 Ch. 767.) As to what is a charity within this rule, *see In re Nottage, Jones* v. *Palmer* (No. 1), (1895) 2 Ch. 649; *Commissioners for Special Purposes of Income Tax* v. *Pemsel,* (1891) A. C. 531.

By sect. 10 of the Conveyancing Act, 1882, where under any instrument coming into effect after 31st December, 1882, "a person is entitled to land in fee, or for a term of years absolute or determinable on life, or for a term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period of time or not, that executory limitation shall become void if and as soon as there is living any issue who has attained the age of twenty-one of the class on default or failure whereof the limitation over was to take effect."

Application of Rule to Powers.—The rule against perpetuities applies to powers of appointment, but its application varies according as the power is special or general. When the power is special, the instrument creating the power is regarded as the settlement. A power contained in it may be void *ab initio* for remoteness where the sole class to which the donee may appoint is within the rule against perpetuities. Thus a limitation to A. for life, with power to appoint among her issue who may be surviving twenty-five years after her death, is void, since it cannot be so exercised as to vest the property in the beneficiaries within the life in being when the instrument creating the special power was created (that is, the life of A.) or within twenty-one years after it dropped. Powers, however, are rarely void for remoteness *ab initio*, since if *any* of the objects of the power are not too remote the power is good.

The difficulty usually arises over the executory interests created by the exercise of powers where the objects include objects too remote and objects not too remote. In such cases the executory interests created by the exercise of the powers are regarded, when they arise, as if they had been originally contained in the settlement itself. (*See Whitby* v. *Von Luedecke*, (1906) 1 Ch. 783; *and see In re Fane*, (1913) 1 Ch. 404.) Thus, take property settled on A. for life and then to such of her children or remoter descendants as she shall appoint, and in default of appointment to her children equally. If A. appoints the property equally among her children who attain the age of twenty-one years, the appointment is read into the settlement as if that instrument were "To A. for life, and after her death among those of her children who attain twenty-one years." That is, of course, a good limitation. But A. may appoint the property among her grandchildren who shall attain the age of twenty-one years. The settlement is then read as if it were originally "To A. for life, and then among those of her grandchildren who shall attain the age of twenty-one years." That, of course, is a bad limitation, since it is not certain that all A.'s grandchildren who shall attain twenty-one years shall attain it within twenty-one years after A.'s death. In order, then, to make an appointment to grandchildren on attaining twenty-one good, it should be limited to grandchildren born during the life of the grandparent. (*See Re Finch & Chew's Contract*, (1903) 2 Ch. 486.)

On the other hand, in the case of a general power of appointment, the instrument creating it is not regarded as a settlement, since the property subject to the power is in no way tied up, the donee of a general power being able to dispose of it in what manner he likes. The settlement here arises—if it arises at all—on the execution of the power itself. When the appointor appoints the property subject to the power, he is precisely in the position of any other grantor. If he appoints to objects too remote, his appointment will fail precisely as if he had been owner and limited the property to the same objects by an ordinary conveyance.

It is to be remembered that a power of appointment is primarily an authority to defeat an existing limitation. Thus on a limitation to A. for life, and on her death to such of her children or remoter issue as she shall appoint. and in default of appointment to her children equally, the limitation to A.'s children equally, though always *placed* after the power, in effect precedes both it and the interests created by the exercise of the power. The settled property is really vested in A. for life and after her death in her children equally, with authority to A. to revoke the trusts in favour of her children equally and appoint to other trusts. Now, if that authority for any reason fails to operate, the trusts for A.'s children equally are not revoked. Accordingly, if the power given to A. is void for remoteness *ab initio*, or if she makes an appointment void for remoteness, the trusts for the children equally are unaffected. This is shortly summed up by saying that limitations following a power void for remoteness do not fail as do limitations following limitations void for the same reason. (*In re Abbott, Peacock* v. *Frigout*, (1893) 1 Ch. 54.)

Accumulations.—An interest in land or goods, then, may be limited so that beneficial interest in it shall not vest in anyone during a life or lives in being and twenty-one years after. The rule which permitted this permitted the income of the land or goods during this period to remain unvested too. Thus, the settlor might direct that the income of the land or goods might be received by trustees and held by them in trust for the benefit of that person in whom the corpus of the property should ultimately vest. Where, however, the corpus is vested from the first solely in the grantee, and it and the accumulated income are both to be paid over to him at the end of the period for which the income is to be accumulated, the Court will not enforce the direction to accumulate. The accumulation directed is for his benefit exclusively, and he is entitled to put an end to it when he likes. (*Wharton* v. *Masterman*, (1895) A. C. 186.)

Owing to an abuse of this right to accumulate the income of settled property by a Mr. Thellusson, who endeavoured to tie up all his property and the income of it for the benefit of his remote descendants, an Act to limit the power was passed, commonly called the Thellusson Act, now the Accumulations Act, 1800.

This Act limited the period during which the income of settled property—whether real or personal—could be accumulated to the following: (a) the life or lives of the settlor or settlors; (b) twenty-one years from the death of the settlor; (c) the minority or respective minorities of any person or persons who shall be living or *en ventre sa mère* at the death of settlor; (d) the minority or respective minorities of any person or persons who under the settlement would for the time being be, if of full age, entitled to the income directed to be accumulated, and who need not be a person or persons *in esse* at the death of the settlor. (*In re Cottell*, (1907) 1 Ch. 547.) These are alternative periods—that is, an accumulation cannot be directed during a combination of two or more of them (*Jagger* v. *Jagger*, 25 Ch. D. 729)—but the Act does not apply to accumulations directed for the purpose of (a) paying the debts of the settlor or of any other person (*Re Heathcote, Heathcote* v. *Trench*, (1904) 1 Ch. 826); (b) raising portions for any child or children of the settlor or of any person taking any interest under the settlement (*see In re Elliott*, (1918) 2 Ch. 150); nor does it extend to any direction as to timber or woods upon any land or tenements. (Sect. 2.)

By 11 & 12 Vict. c. 36, s. 41, the Thellusson Act is extended to heritable property in Scotland, but it does not apply at all to Ireland. The fact, however, that the owner of land in England has an Irish domicile will not prevent the application of the Act to a settlement by him of such land. (*Freke* v. *Lord Carbery*, L. R. 16 Eq. 461.)

A further restriction has been put upon accumulations by the Accumulations Act, 1892. By that Act, where the funds resulting from accumulating the income of settled property are to be invested in the purchase of land only, no accumulation is to be for a longer period than the minority or respective minorities of the person or persons who would, if of full age, be entitled to receive the income directed to be accumulated. (*In re Danson, Bell* v. *Danson* (1895), W. N. 102.) This Act is not expressly limited to Great Britain, nor is it to be read with Thellusson's Act. There can therefore be little doubt that the Act of 1892 applies to Ireland, where heretofore the only limit on accumulations was that imposed by the rule against perpetuities. (*Cochrane* v. *Cochrane*, 11 L. R. Ir. 361.) It also applies where the accumulation arises under an instrument which came into operation before the passing of the Act. (*Re Baroness Llanover, Herbert* v. *Freshfield*, (1903) 2 Ch. 6.)

It has been held that any limitation in a settlement which directs accumulation during a period exceeding that allowed by the Thellusson Act, and yet not exceeding the period allowed by the rule against perpetuities, is not, like a limitation violating the latter rule, void *ab initio*, but is merely void in so far as it exceeds the period allowed. (*Lord Southampton* v. *Marquis of Hertford*, 2 Ves. & B. 54; *and see In re Pope, Sharp* v. *Marshall*, (1901) 1 Ch. 64.)

SECTION IV.

IN CONDITIONAL OWNERSHIP.

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Conditional Ownership.—When a person owns an interest in land or goods, subject to a condition which, under certain circumstances, will transfer it to another or others, his ownership is conditional, or, as it is sometimes called, defeasible. This means, that by the instrument creating his interest its existence or its *quantum* is made to depend on the happening or non-happening of a future and uncertain event. That event may be one which the grantee may or may not be able to bring about; in either case, so long as it is uncertain whether it will happen or not, his interest is conditional.

Kinds of Conditions.—Conditions generally arise by express limitation, but sometimes they are implied by law. Formerly, for example, it was an implied condition of a life estate that the tenant for life should not alienate, or attempt to alienate, the fee simple. Such an act on his part (called a *tortious* feoffment) caused a forfeiture of the life estate to the reversioner or remainderman. Now, however, implied conditions usually arise in connection with the tenure of offices, it being always an implied condition of an office that the holder of it shall discharge the duties of it. (Co. Litt. 233; 2 Bl. Com. 152.)

Conditions arising by express limitations, or express conditions, as they are commonly called, are of two kinds, *precedent* and *subsequent*. Conditions which are precedent as to one interest and subsequent as to another are sometimes called *mixed* conditions, or conditions of *cesser and acceleration*.

A condition precedent is a condition which must be fulfilled before any interest can arise; a condition subsequent, a condition which is annexed to the interest after it has come into existence. Take, for example, a limitation to the use of A.'s second son and his heirs, but should such second son succeed to A.'s settled estates, then to the use of A.'s third son and his heirs. Now here the condition affecting the interests of both sons is the same—the second son's succeeding to his father's settled estates. But as to the interest of the second son, it is a condition subsequent, while as to the interest of the third son, it is a condition precedent. Immediately on the instrument coming into operation the gift to the second son is complete; his interest is vested subject to the condition which may divest it and transfer it to his younger brother. The latter, however, has no actual interest in the land until the condition is fulfilled, and if it never be fulfilled, he never shall have any interest under the grant. As the condition is thus a condition precedent as to the third son's interest, and a condition subsequent as to the second son's interest, it belongs to that class of conditions which, as they have the characteristics of both conditions precedent and conditions subsequent, are called mixed conditions.

The distinction between conditions precedent and conditions subsequent is important in many respects, but in none more so than as regards void conditions.

Void Conditions.—Conditions of all kinds are void when they are contrary to the law, or contrary to the policy of the law, or when they are impossible, uncertain, contrariant, or repugnant to the nature of the estate.

A condition is contrary to the law, or illegal, when the law of England prohibits the performance of it. Thus a condition that the grantee of an interest shall, within a given time, murder a certain person, would be illegal and therefore void. (Co. Litt. 206 b.) And a condition which, at the time the instrument creating it was executed, was quite legal and capable of performance, may by a subsequent change in the law become illegal and accordingly void. Thus if a lease of land were granted subject to a condition to maintain and repair certain houses thereon, and afterwards, in furtherance of some scheme of public improvement, the said houses were ordered to be demolished, the condition requiring their maintenance would become void.

A condition, on the other hand, is contrary to the policy of the law when its object, though not contrary to any positive rule of law, yet is to restrain something which the law regards with favour, or to promote something which the law regards with disfavour. Thus, a condition tending to promote immorality, a condition in general restraint of marriage, a condition in general restraint of trade, a condition in general restraint of alienation, are all void as being contrary to the policy of the law.

Again, a condition is impossible when, at the time the instrument creating it was executed, it was plainly physically impossible to perform it, as, for example, a condition that the grantee shall visit the moon. And a condition is uncertain when it is so vague in its terms that no one can say what it requires. And a condition is contrariant when it is irreconcilable with the gift or grant to which it is attached; as, for example, if the grant be of an estate tail, and the condition be that the estate is to go over to another not on failure of the heirs of the grantee's body, but on his death. And a condition is repugnant to the nature of the estate when it endeavours to attach to the estate granted an incident which the law does not permit to be attached to the kind of estate granted: as if, for example, the grant be of an estate in fee, subject to the condition that the grantee shall be impeachable for waste. (*See In re Elliot, Kelly* v. *Elliot*, (1896) 2 Ch. 353.)

Now, with regard to void conditions, the general rule is this: that where they are conditions precedent they prevent any estate ever arising, while where they are conditions subsequent they have no effect in determining or altering the estate to which they are attached. The reasoning on which this rule is based seems to be this: void conditions are incapable of legal performance; therefore, where their performance must by the terms of the grant precede the arising of the interest, the interest cannot arise; while where it must precede the determination of the interest, the interest cannot be so determined. (*See In re Greenwood, Goodhart* v. *Greenwood*, (1903) 1 Ch. 749.) A partial exception to this rule occurs in the case of conditions in restraint of marriage.

Conditions in Restraint of Marriage.—It is only conditions in general restraint of marriage that are void, and even they are only *primâ facie* void, not void *per se*. (*See In re Hewett*, (1918) 1 Ch. 458.) A limitation merely on the right to marry, like a limitation on the right to trade, is good provided it is reasonable. (*Jenner* v. *Turner*, 16 Ch. D. 188.) Thus, a condition in restraint of a second marriage,[1] or in restraint of marriage to a particular person, or in restraint of marriage to any member of a class socially inferior to the person restrained (*Greene* v. *Kirkwood* (1895), 1 Ir. R. 130), or without the consent of such person's parents or guardians, is reasonable (*In re Whiting's Settlement, Whiting* v. *De Rutzen*, (1905) 1 Ch. 96), and therefore good.

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[1] *In re Whitfield*, (1911) 1 Ch. 310, is a curious case on the question of second marriages. A husband left an income to his widow determinable on second marriage. The widow went through a form of marriage with her deceased sister's husband which before the Deceased Wife's Sister's Marriage Act, 1907, was invalid. On the passage of that Act the marriage became valid. Held, that the income did not determine as the Act was never intended to alter property rights.

Where, however, the interest to which a condition in general or partial restraint of marriage is annexed is an interest in personalty, two exceptions to the general rules as to conditions are made:

(1) In the case of a condition subsequent in partial restraint of marriage, unless there is a gift over of the interest on the breach of the condition,

(2) or in the case of a condition precedent in partial restraint of marriage, unless the donee is in any case provided for and the gift on marriage with consent is only alternative or in addition to that given in any event,

the condition is considered *in terrorem*, and therefore void. (*In re Nourse, Hampton* v. *Nourse*, (1899) 1 Ch. 63.)

Where there is a condition in restraint of marriage, save with consent of parents or other persons, the consent in question must be given before the marriage, and the consent of the survivor, where one of those whose consent is required is dead, will suffice. But if by the act of God the sole person to consent becomes unable to do so—as by his dying or becoming lunatic (*In re Harris, Fitzroy* v. *Harris* (1891), W. N. 76)—the condition is discharged.

Conditional Limitations.—A conditional limitation differs from a grant subject to a condition subsequent in this respect: in the latter, the condition is something superadded to the limitation, of which, strictly speaking, the grantor only can take advantage; in the former, the condition is itself part of the limitation, and it transfers the estate granted to a third person. Thus, a grant to A. for life, but if B. should return from Rome then the grantor to re-enter and determine the grant, would be a grant subject to a condition subsequent; but a grant to the use of A. until B. returns from Rome, and then to C. in fee, though A. would take practically the same interest, would nevertheless be not a grant subject to a condition subsequent, but a conditional limitation. (*See* Co. Litt. 203 b, note.)

The distinction is important for two reasons. In the first place, an event which would be bad as a condition subsequent may be good as the determining event in a conditional limitation. Thus, a grant of land by way of use, or a gift of personalty by way of trust, or a gift of either land or goods by will to a person until he marries or until he attempts to alienate, and then to another, will determine on the marriage of the grantee or on the first attempt on his part to alienate. (*Dugdale* v. *Dugdale*, 38 Ch. D. 176; *and see In re Sheward, Sheward* v. *Brown*, (1893) 3 Ch. 502.) In the second place, while the breach of a condition subsequent does not determine the interest unless the person entitled to take advantage of it re-enters, the happening of the determining event in the case of a conditional limitation puts an end *ipso facto* to the interest.

It follows from this latter circumstance that, in case the grantee under a conditional limitation not subject to a rent were permitted to hold on for twelve years after the happening of the determining event without acknowledging in writing the reversioner's title, the latter would be barred under the Statute of Limitations. (*See infra, p.* 306.) No such result would follow in the case of a grant subject to a condition subsequent.

Conditional Interests.—In the preceding parts of this work we have had to consider most kinds of estates and interests in personalty subject to conditions. It is unnecessary to repeat what has already been said of them. But there is one class of conditional estates which we have so far only referred to incidentally, and that is mortgage estates.

Mortgage estates differ from other conditional estates in this respect: other conditional estates are conditional only to this extent—that their existence depends on the conditions: while they exist, their incidents are practically the same as the incidents of estates of the same kind not subject to a condition. Mortgage estates, on the other hand, are to a great extent the creatures of the condition annexed to them; most of their incidents result from the condition, and these incidents are very different from the incidents of estates of the same kind which are not subject to the mortgage condition. For this reason, mortgage estates, unlike other conditional estates, need separate and individual treatment.

Mortgages generally.—A mortgage is a transaction in which a borrower transfers to the lender the ownership of, or an interest in, land or goods, the condition of the transfer being that the ownership or interest is vested in the lender as security for the loan. The borrower is called the mortgagor, the lender the mortgagee, the loan the mortgage debt, and the land or goods transferred the mortgage estate or property.[1]

The common law regarded a mortgage, of land at any rate, as simply a conveyance for value, subject to a condition that if the purchase-money were paid on a certain day, with interest in the meantime, the estate granted would revert or (after the Statute *Quia Emptores*) the vendee should reconvey it to the vendor; and on the principle of construing grants strictly as against the grantor, it held that any failure to fulfil the condition on the part of the vendor was a breach of the condition, and, as such, rendered the land or goods conveyed the absolute property of the vendee. (Co. Litt. 205 a.) Equity, however, looked at the essence and not the form of the transaction. The essence of the transaction was the loan made by the mortgagee to the mortgagor, and the land was transferred simply to secure the repayment of that loan. Equity insisted that the land should be held merely as a security, and that, provided the creditor suffered no substantial damage, it did not matter whether the condition to repay on a given day was strictly fulfilled or not; even after failure to pay on that day the mortgagor was entitled, subject to reasonable conditions for the protection of the mortgagee, to repay the loan and to demand a re-transfer of the thing mortgaged. Meanwhile equity regarded the mortgagor as the real owner of the mortgage estate, and the mortgagee as a mere creditor with a claim to payment out of it. (*See* Strahan's Mort. Part II. Sect. I.)

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[1] Two other transactions in the nature of mortgages of land were formerly in use: *Vivum vadium,* or living pledge, where the lender entered upon the land and received the rents and profits until these had paid off his loan; and the Welsh mortgage, where the lender received the profits in lieu of interest on the loan. Both these are now obsolete in England, but are still in occasional use in Ireland.

So anxious was equity to preserve to the mortgagor the right to redeem that it would not permit it to be taken from him, or to be in any way clogged or fettered by any agreement entered into between the mortgagee and him at the time the mortgage was effected. For example, if it was then expressly agreed that on failure to pay the debt the mortgagee should be entitled to the property absolutely or conditionally on giving the mortgagor a certain further amount, the Court would hold this agreement invalid. Once it was proved that the transaction was one by way of security for a loan, the usual incidents of a mortgage attached themselves to it, among which was the right to redeem the property without the consent of the lender and without any condition tending to diminish the value of the property after redemption (*Rice* v. *Noakes*, (1902) A. C. 24; *Kreglinger* v. *New Patagonia Meat* Co., (1914) A. C. 25), on payment of the mortgage debt at any time before foreclosure. (*See infra*, p. 212.) This is what is meant by the maxim, once a mortgage, always a mortgage. (*See Salt* v. *Marquess of Northampton*, (1892) A. C. 1; Strahan's Mort. Part II. Sect. I.)

In holding a mortgage to be merely a transaction for securing the repayment of a loan, equity, as has been said, was guided by the real nature of the transaction—*i.e.*, the intention of the parties. If what the parties intended was not a mortgage but a conditional sale, then equity regarded the transaction as what it was—an out-and-out conveyance, subject to a condition to re-convey at a certain time and on certain terms—and insisted as strongly as the common law on the condition being observed. As a mortgage and a conditional sale were often the same in form, sometimes it was difficult to decide which of them was intended in a given case. Under such circumstances the test was whether a debt for which the grantor could be sued resulted from the transaction. If it did, the case was one of mortgage; if it did not, the case was one of conditional sale. (*Williams* v. *Owen*, 5 M. & C. 308.) Where there was no evidence as to this, equity would look to the circumstances surrounding the transaction, such as the amount of money given in comparison with the value of the thing transferred, the party who paid the costs of the transaction (the practice being for a mortgagor to pay for a mortgage, while a vendee pays for his conveyance), whether the grantee entered immediately into possession of the thing transferred, and such like. (*Ex parte Odell*, 10 Ch. D. 76.)

Kinds of Mortgages.—Mortgages are divisible into three classes—*legal*, *equitable*, and *statutory*.

A legal mortgage is a mortgage by which the legal title to an interest of the mortgagor's[1] in the thing mortgaged is transferred to the mortgagee. An equitable mortgage is a mortgage by which an equitable title to an interest of the mortgagor's in the thing mortgaged is transferred to the mortgagee. A statutory mortgage is a mortgage which derives its legal effects from a statute. Often it transfers to the mortgagee neither a legal nor an equitable title but merely a right to realise his debt by the sale of the thing mortgaged, as in the case of a mortgage of a ship under sects. 34 and 35 of the Merchant Shipping Act, 1894 (*see Appendix E.*), or a right, on failure of the mortgagor to pay the interest or debt, to enter upon the thing mortgaged and receive the rents and profits, or have the legal title to it transferred to him, or the land sold, as in the case of a registered charge on land, under the Land Transfer Acts, 1875 and 1897. Statutory mortgages properly so called are to be distinguished from statutory mortgages under sects. 26 and 28 of the Conveyancing Act, 1881, which are practically ordinary legal or equitable mortgages in the form given in the statute, which implies certain covenants.

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[1] In mortgages of leaseholds it is usual not to convey the mortgagor's whole interest to the mortgagee, but merely to grant him a sub-lease; the object being to relieve the mortgagee from liability for breaches of covenant and failure to pay rent on the mortgagor's part while the mortgagor remains in possession. If the leasehold were assigned, the mortgagee would be liable for these, even though he never took possession of the land. Formerly mortgages of fee simple were usually effected also by leases from the mortgagor to the mortgagee. The chief object of this was to secure that on the mortgagee's death the legal estate in the mortgaged land would vest—as the right to the mortgage debt did—in his personal representatives.

In Ireland there is a peculiar kind of statutory mortgage, called a judgment mortgage, which arises under the provisions of 13 & 14 Vict. c. 29. Sections 6 and 7 of that Act provide that any judgment creditor may make an affidavit specifying any lands of which his judgment debtor is seised or possessed, or over which he has a general power of appointment, to be exercised without the assent of another person. On this affidavit being registered, all the estate of the judgment debtor in the lands specified is vested in the judgment creditor, subject to a right of redemption reserved to the debtor on payment of the money mentioned in the judgment. The judgment debt thus becomes a judgment mortgage on the land in question, and the rights and remedies of the judgment mortgagee are the same as those enjoyed by a mortgagee by deed. (*Eyre* v. *McDowell*, 9 H. L. C. 647.)

It will not be necessary to say more here of statutory mortgages. As to legal and equitable mortgages, these subsist equally over land and goods. Mortgages of goods, however, differ considerably from mortgages of land, and therefore it will be expedient to treat of the two kinds separately.

Sub-section 1.

MORTGAGES OF LAND.

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Legal and Equitable Mortgages.—As has already been said, a legal mortgage is one which transfers to the mortgagee a legal title to an interest of the mortgagor's in the thing mortgaged. Now, in order that a legal title may be transferred, two conditions must be fulfilled: firstly, the mortgagor must have a legal title; and, secondly, he must execute a legal transfer of it. If he has only an equitable title he can only make an equitable mortgage, whatever sort of conveyance he uses. Thus, a *cestui que trust* who mortgages his interest in the trust estate, or a legal mortgagor who executes a second mortgage on the mortgage estate, can only create an equitable mortgage, since neither of them has a legal title to transfer. Again, if a mortgagor uses, in making a mortgage, a conveyance not recognized by the common law or by statute, whether he has a legal title or not, the mortgage is only equitable. Thus, the legal owner of a fee simple estate, who obtains an advance from his banker by depositing as security the title deeds to his fee simple estate, does not create a legal mortgage of that estate.[1] The mere deposit of title deeds is not sufficient at law to transfer title to any interest in land, though it is sufficient in equity.

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[1] This must be distinguished from a mortgage of the title deeds themselves as chattels by means of a bill of sale. Such a mort-

Equitable mortgages, then, arise either through the mortgagor having only an equitable title to the thing mortgaged, or through his employing a mode of conveyance which, being recognized only in equity, can transfer only an equitable title. Equitable mortgages of the former kind, however, approach much nearer legal mortgages than equitable mortgages of the second kind, and it is impossible to discuss legal mortgages without considering them. Accordingly, we will divide the subject of mortgages of land, not into legal and equitable mortgages, but into mortgages by deed and mortgages by deposit of title deeds, or by memorandum of deposit; or, to put it in other words, mortgages by legal conveyance and mortgages by equitable conveyance.

A. *Mortgages by Deed.*

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Position of Parties to Mortgage.—As has been pointed out, the effect of a mortgage by deed is to convey whatever interest is included in the mortgage, whether that is legal or equitable, to the mortgagee. If he be first mortgagee,

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gage conveys to the mortgagee no interest whatever in the lands to which the title deeds relate. (*See Swanley Coal Co.* v. *Denton,* (1906) 2 K. B. 873.)

he becomes entitled to and should—for his protection—obtain possession of the mortgagor's title deeds. He is entitled at common law, moreover, to immediate possession of the land mortgaged, even though there be a covenant in the mortgage deed that the mortgagee shall not claim possession until default is made in paying the interest or principal of the debt, such a covenant merely giving the mortgagor a right to damages if the mortgagee takes possession in defiance of it (*Cholmondeley* v. *Clinton*, 2 Meriv. 359; *Doe* v. *Davies*, 16 Jur. 44), though equity would restrain an action to obtain possession in breach of the covenant. This right to take immediate possession is now, to a certain degree, limited by the Common Law Procedure Act, 1852, which enacts that, in an action of ejectment brought by a mortgagee against a mortgagor, the Court will stay proceedings on payment by the mortgagor of debt, interest, and costs. (Sects. 219, 220.)

As is intended, however, this right to take possession is seldom exercised by the mortgagee until the mortgagor make default in payment of interest or debt. Meanwhile, the mortgagor remains in possession, as tenant by sufferance if he has not attorned tenant, or, if he has done so, as the tenant at will of the mortgagee (*Scobie* v. *Collins*, (1895) 1 Q. B. 375), but really with nearly all the ordinary powers of a legal owner. Thus, he is entitled to receive all the rents and profits of the land without rendering any account of them to the mortgagee. (Strahan's Mort. Part II. Sect. I.) Formerly, however, he could not sue for these without joining the mortgagee, who was the legal owner. However, now by sect. 25, sub-sect. 5, of the Judicature Act, 1873, and in Ireland by sect. 28, sub-sect. 5, of the Supreme Court of Judicature (Ireland) Act, 1877, he is enabled to sue for them in his own name. He can, moreover, commit the same waste after the mortgage as he could before it, provided he does not thereby injure the mortgagee by rendering the land a scanty security for the debt. And if a business be carried on upon the mortgaged land, he can make subject to the same proviso any contracts affecting the land which may be necessary for carrying on the business. (*Gough* v. *Wood*, (1894) 1 Q. B. 713.) Besides these rights, considerable powers of leasing are usually conferred on him by the mortgage deed, and in mortgages executed since the commencement (31st December, 1881) of the Conveyancing Act, 1881, certain such powers are implied, unless the deed expressly excludes them. These implied powers permit him to grant, without the concurrence of the mortgagee, agricultural or occupation leases for terms not exceeding twenty-one years, and building leases for terms not exceeding ninety-nine years, such leases to take effect in possession within twelve months of grant, to have the best rent reasonably obtainable reserved on them, and to contain covenants for the payment of rent.[1] (Sect. 18; *Brown* v. *Peto*, (1900) 2 Q. B. 653.) Where the mortgage, having been executed before the commencement of the Conveyancing Act, 1881, contains no powers of leasing, or, having been executed after the commencement of that Act, expressly denies such powers to the mortgagor, the mortgagor can still grant leases binding against himself, but liable to be set aside by the mortgagee on taking possession of the land. To bind the mortgagee in these cases, he must join in the lease.

It is to be noted that the provisions of sect. 18 of the Conveyancing Act, 1881, apply to mortgages, whether by deed or not. Where the mortgage is not by deed, the powers given by the section can only be excluded by a written agreement between the mortgagor and mortgagee. Such an agreement will exclude them in any case. (Subsect. 13 of sect. 18.)

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[1] The mortgagor in possession had, however, no implied authority to accept the surrender of leases of the mortgaged land. (*Robbins* v. *Whyte*, (1906) 1 K. B. 125.) Now, however, either the mortgagor or mortgagee in possession has statutory power to accept surrenders of leases for the purpose of granting new ones. (*See* Conveyancing Act, 1911, s. 3.)

Besides these rights, which belong to a mortgagor only so long as he is in possession of the land, there are others which belong to him whether he is in possession or not. His right to redeem the land from the mortgage, which is commonly called his *equity of redemption*, is regarded, as has already been said, as an equitable estate in the land (*Casborne* v. *Scarfe*, 1 Atk. 603; 2 W. & T.), and he may deal with it as an estate. He may sell it, settle it, or mortgage it, though, if he mortgage it without informing the second mortgagee of the prior mortgage, his right to redeem will, as a penalty, become forfeited. (4 & 5 Will. & Mary, c. 16.) On his death it will devolve precisely as the legal interest would have done, that is, if it is a fee simple, an estate *pur autre vie*, or a leasehold, it will go under his will, if he has made one; if he has not made one, it will devolve according to its nature and its tenure, that is, it will go to his administrators for his next of kin if leasehold or an estate *pur autre vie*, and for his common law or customary heir, according as the tenure is common socage or gavelkind socage if it be fee simple.

Formerly, if the mortgage was made by the mortgagor himself, *i.e.*, was not one affecting the land when he first obtained it, on his death the person succeeding to the mortgaged land, as devisee or heir, was *primâ facie* entitled to have the mortgage debt paid out of the mortgagor's personal estate, which is, as we shall see, primarily liable for the payment of its deceased owner's debts. Now, however, that rule is reversed by Locke King's (or Real Estate Charges) Acts, 1854, 1867, and 1877, and the mortgage debt is primarily payable out of the mortgaged land unless there is a contrary intention expressed. (*See In re Valpy*, *Valpy* v. *Valpy*, (1906) 1 Ch. 531; *In re Wilson*, (1908) 1 Ch. 839; Strahan's Mort. Part III. Sect. III.)

The mortgagee, on the other hand, though on execution of the mortgage deed he becomes legal owner of the interest mortgaged, yet is regarded in equity as merely a creditor having a charge on the land as a security for his debt. (*See In re Loveridge, Pearce* v. *Marsh*, (1904) 1 Ch. 518.) As long as he permits the mortgagor to remain in possession, he has practically little power over the land. Perhaps his most important relation to it is, that he cannot take a lease of it from the mortgagor. Even his taking possession does not put him in as good a position as that enjoyed by the mortgagor in possession. He is, like him, entitled to the rents and profits of the land, but, unlike him, he is bound to render, on demand, a strict account of all he has received, and of all that, but for his wilful default or negligence, he might have received. (*Noyes* v. *Pollock*, 32 Ch. D. 53.) In such account he must also make due allowance for any part of the land he may have himself occupied by charging against himself an occupation rent. He is bound, moreover, to keep the mortgaged premises in repair as far as the surplus rents and profits will enable him to do so; and he can, in rendering accounts, take credit for what he has spent in repairs or in making improvements, as far as these have enhanced the value of the land. (*Henderson* v. *Astwood*, (1894) A. C. 150.) And he is not entitled to commit waste, unless the land forms a scanty security for his debt, when he can commit such waste as may be necessary to raise sufficient money to pay the interest. And in case of mortgages by deed, executed after the Conveyancing Act, 1881, unless he is expressly prohibited by the deed from so doing, a mortgagee in possession may cut timber ripe for cutting, and not planted for ornament or shelter, whether his security be scanty or not. (Conveyancing Act, 1881, s. 19, sub-s. 1 (iv).)

The mortgagee in possession has besides considerable powers as to leases. He is bound by leases made before the mortgage, but the lessees under such leases need not pay him their rents until notice to do so has been given them. As to leases made by the mortgagor after the mortgage, if the mortgagee was a party to them, he is, of course, bound by them; but if he was not a party to them, unless they were made under an express power, or a power implied by the Conveyancing Act, 1881, he can, on taking possession, repudiate them. If, however, by repudiating an advantageous lease he brings loss upon the estate, he will be liable for that loss as profit which he might, but for his wilful default, have received. (2 Spence's Eq. Juris. 806.) In possession he has, under sect. 18 of the Conveyancing Act, 1881, the same powers to grant leases as those enjoyed by a mortgagor in possession.

Whether in possession or out of possession, equity always regarded the mortgagee as being a mere creditor, and, therefore, it regarded his interest in the land as pure personalty. Accordingly, on his death, it devolved like pure personalty—that is, it went to his executors, if he left a will; to his administrators if he did not. But at law he owned the land, and so, when he died, leaving a will, the mortgaged estate, if freehold, went under the residuary clause or otherwise to the residuary or special devisee; and if he left no will, it descended to his heir. This led to various difficulties, which several statutes were passed to remove. (*See* 13 & 14 Vict. c. 60, ss. 19, 20.) Now, by sect. 30 of the Conveyancing Act, 1881, the legal rule is made to conform to the equitable rule, and henceforth, when a mortgagee dies, whether he leaves a will or whether he dies intestate, the legal estate in the mortgaged land (unless such land be of copyhold or customary tenure (Copyhold Act, 1894, s. 88)) is to vest, like personalty, in his personal representatives.

Remedies for Interest on Mortgage.—(a) *Taking possession.*—If the mortgagor fails to pay the interest due on the mortgage debt, the mortgagee may, if he likes, secure its payment by taking possession of the mortgaged land, as we have seen. He can then deduct out of the rents and profits received by him the interest due to him, and either hand the balance over to the mortgagor, or devote it to the reduction of the mortgage debt. Resort to this means of obtaining payment of interest is not much practised for two reasons. In the first place, the mortgagee in possession, as has been pointed out, is liable to account not merely for what he receives, but for what he might, but for his own default or negligence, have received; and in the second place he is not entitled to any remuneration for the trouble of managing the estate. An exception to the latter rule has recently been made in cases where the mortgagee is a solicitor. A solicitor mortgagee is entitled to charge for any legal work done by him which, if he were not a solicitor, he might retain a solicitor to do. (Mortgagees' Legal Costs Act, 1895; *see Day* v. *Kelland*, (1900) 2 Ch. 744.)

(b) *Appointing receiver.*—A more common and convenient way of obtaining payment is that supplied by the power now usually given to the mortgagee to appoint a receiver on failure of the mortgagor to pay the interest on the mortgage debt. Such a power is now implied by sect. 19 of the Conveyancing Act, 1881, in all mortgages by deed executed after the commencement of the Act not containing a provision excluding it. The implied power arises only where the mortgagee would be entitled under the Act to exercise the statutory power of sale. (*See infra, p.* 214.) The receiver must be appointed in writing under the hand of the mortgagee, who is entitled at any time to remove him. The great advantage, from the mortgagee's point of view, of this mode of proceeding, is that, though he appoints the receiver, yet the latter is regarded as the agent of the mortgagor, and so the mortgagee is not liable for his negligence or misconduct in his office. Moreover, the appointment of a receiver does not render the mortgagee liable under the covenants affecting the mortgaged land which taking possession would. The receiver is entitled to a commission of 5 per cent. on the profits collected by him for his labour. As to the profits collected by him, they are to be devoted to (1) the payment of rent, taxes, and outgoings; (2) keeping down annual payments and interest on preceding mortgages; (3) payment of receiver's commission and costs of insurance and repairs; (4) payment of interest on mortgage of appointor; (5) residue to go to person entitled to the land subject to the mortgage. (Sect. 24, Conveyancing Act, 1881; *and see White* v. *Metcalf*, (1903) 2 Ch. 567.)

(c) *Action on covenant.*—Where there is a separate covenant to pay the interest, as distinct from the corpus of the mortgage debt, as there is in well-drawn mortgage deeds, an action can be brought on it to recover the interest without at the same time seeking repayment of the principal. In such an action only six years' arrears of interest is recoverable. (Real Property Limitation Act, 1833, s. 42.)

Remedies for Mortgage Debt.—Though equity held that a mortgagor's right to redeem the mortgaged land was not lost by his failure to pay the mortgage debt on the exact day fixed by the mortgage deed, yet it always would, on the application of the mortgagee, fix a time when the mortgagor would have to redeem or be deprived of his right to redeem altogether. This was, and still is, the primary remedy which a mortgagee possesses for the recovery of the mortgage debt. It is called *action for foreclosure*. Besides foreclosure, however, there are now commonly two other remedies which often prove more beneficial to the mortgagee. These are *sale* of the mortgaged land, and *action on the covenant* to repay the debt. (Strahan's Mort. Part V.)

We will treat shortly of these *seriatim;* but, before doing so, it is well to point out that these remedies, when they all exist, are not alternative, but concurrent remedies. (*Stevens* v. *Theatres, Limited*, (1903) 1 Ch. 857; *and see Williams* v. *Hunt*, (1905) 1 K. B. 512.) Thus, the mortgagee may sue on the personal covenant, and, if he obtains only partial repayment in this way, he may foreclose for the balance of his debt. (*Rudge* v. *Richens*, L. R. 8 C. P. 358.) He may even claim foreclosure and judgment on the covenant in the same writ (*Dymond* v. *Croft*, 3 Ch. D. 512); while, as we shall see, in any action for foreclosure, the Court, if it thinks proper to do so, may order a sale of the mortgaged estate instead. Where, however, a foreclosure has been obtained, if the mortgagee sues on the covenant, this will have the effect of re-opening the foreclosure and enabling the mortgagor to obtain a reconveyance of the estate on repayment of the debt with interest and costs; and if the mortgagee has, after foreclosure, so dealt with the property as to make it impossible for him to reconvey it, he will not be permitted to sue on the covenant.

(a) *Foreclosure.*—In a foreclosure action, the plaintiff —who may be the first or any other mortgagee—claims that a time shall be fixed during which the mortgagor must repay the mortgage debt with arrears of interest (not exceeding six years') and costs, or be for ever foreclosed of his right to redeem. This right arises only after the mortgagor has incurred forfeiture under the terms of the mortgage. (*Williams* v. *Morgan*, (1906) 1 Ch. 840.) As has been said, the action may be brought by any mortgagee, but when among several mortgagees it is brought by any one except the last, he must claim foreclosure of all the mortgages following his, as well as of the equity of redemption. On the other hand, while any second or later mortgagee is entitled to redeem the mortgages preceding his own, he can only redeem them in the order in which they precede his. This is what is meant by the maxim "redeem up, foreclose down." (Strahan's Mort. Part IV.) It may be added that foreclosure is practically unknown in Ireland, the Court in every case ordering a sale. (*Loughran* v. *Loughran*, 15 L. R. Ir. 71.)

(b) *Sale.*—Sale of the mortgaged estate may take place under an order of the Court, or under an express power in the mortgage deed, or under a power implied by statute.

As to sale by order of the Court, by sect. 25 of the Conveyancing Act, 1881, any person entitled to redeem may have, instead of an order for redemption, an order for the sale, or for sale or redemption in the alternative, of the mortgaged estate. (Sub-sect. 1.) And in any action for foreclosure, redemption, or sale, the Court may, on the request of any person interested in the mortgaged estate, whether as mortgagor or mortgagee, order if it thinks fit, a sale of the mortgaged estate on such terms as it thinks just. (Sub-sect. 2.)

This section, however, does not extend to Ireland. In Ireland the Landed Estates Court is given power, by sect. 43 of the Sale and Transfer of Land (Ireland) Act, 1858, to order a sale of land which is subject to any incumbrance on the application of any incumbrancer or owner.

In the case of sale under an express power given to the mortgagee by the mortgage deed, the terms of the power must be strictly observed. Where, however, no express power is so given, then a statutory power to sell is implied by sect. 19 of the Conveyancing Act, 1881. That implied power enables the mortgagee to sell or concur in selling the mortgaged estate either together or in lots, and either by public auction or by private contract, and subject to such conditions of sale as the mortgagee may think fit, with power to vary the contract of sale, or rescind it and resell. In exercising this power the mortgagee is not liable for loss, provided he has acted honestly in the matter. (*Kennedy* v. *De Trafford*, (1897) A. C. 427.) And the power is given him not for the benefit of the mortgagor, but for his own benefit, and so, subject to the same proviso, he need not consult the interests of the mortgagor in exercising it. Thus he is under no obligation to delay a sale because it is probable a better price would be obtained if it was delayed. (*Farrar* v. *Farrars*, *Limited,* 40 Ch. D. 395; *and see Nutt* v. *Easton,* (1899) 1 Ch. 873; (1900) 1 Ch. 29.) On the other hand, when he has commenced an action of foreclosure, and has obtained a decree *nisi, i.e.*, a decree directing the mortgagor to redeem within six months or be for ever foreclosed of the right to do so, the mortgagee's power of sale is suspended till the expiration of the six months. (*Stevens* v. *Theatres, Limited,* (1903) 1 Ch. 857.)

This power is implied only, (a) in mortgages by deed; (b) made after the commencement of the Act; (c) where there is nothing to the contrary in the mortgage deed. It arises only (a) after notice to pay the mortgage debt and failure for three months to pay; or (b) interest has been in arrears for two months; or (c) there has been a breach of some condition in the mortgage other than the condition to pay the debt. (Sect. 20.) These provisions apply to Ireland.

When the mortgaged estate has been sold, if it is sold free of incumbrances, the purchase-money must be devoted first to the payment of all incumbrances upon the land entitled to priority over that of the person exercising the power. That person is then entitled to discharge his own mortgage together with any arrears of interest due, even though more than six years' arrears be due (*In re Marshfield, Marshfield* v. *Hutchins,* 34 Ch. D. 721; *and see In re Lloyd, Lloyd* v. *Lloyd,* (1903) 1 Ch. 385), and to repay himself money spent by him in repairs and permanent improvements while in possession before sale, so far as these have enhanced the value of the land. (*Henderson* v. *Astwood,* (1894) A. C. 150.) If there be any surplus the mortgagee who sold is a trustee, in the first place, for any puisne mortgagees of whose mortgages he has notice, and after or in default of these, for the mortgagor. (*West London Commercial Bank* v. *Reliance Permanent Building Society,* 29 Ch. D. 954.) As a trustee he is entitled, in case of a breach of trust, to the benefit of the provisions of the Trustee Act, 1888, and the Judicial Trustee Act, 1896, to the same extent as an express trustee. (Strahan's Eq. pp. 138 to 160; *Thorne* v. *Heard and Marsh*, (1895) A. C. 495.)

(c) *Action on covenant.*—There is now usually a covenant in every mortgage deed in which the mortgagor binds himself to repay the mortgage debt. An action on this lies against the mortgagor even after he has parted with his equity of redemption, but if the mortgagee sues him after he has parted with it, that will revive his right, on payment of the mortgage debt, to have the mortgagee's estate in the land conveyed to him. (*Kinnaird* v. *Trollope*, 39 Ch. D. 636.) Even, however, where there is no such covenant, the lending of the money implies a promise to repay it on which an action of debt would lie, unless there is something in the mortgage deed to show that the mortgagee was to look solely to the land for the satisfaction of the debt. (*Yates* v. *Aston*, 4 Q. B. 182.) Such an action would, however, be liable to be barred, like an action for any other simple contract debt, by the lapse of six years since interest or part of the debt was last paid, or since an acknowledgment in writing of the debt was last made by the mortgagor.

Where, however, there is a covenant to pay in the mortgage deed, an action lies upon it until twelve years have elapsed since the last payment on account of interest or debt, or the last written acknowledgment of the debt by the mortgagor or his assign. (*In re Lacey, Howard* v. *Lightfoot*, (1907) 1 Ch. 330.) And this will be the case when there is not merely a covenant in the mortgage deed, but a separate bond for the amount given by the mortgagor to the mortgagee. Generally speaking, the period of limitation for actions on bonds or covenants is not twelve but twenty years (*see Appendix F.*); but in the case of money charged on land by mortgage, judgment or lien, the period is reduced to twelve by sect. 8 of the Real Property Limitation Act, 1874, and this enactment extends to all remedies for such money. (*Sutton* v.

Sutton, 22 Ch. D. 511; *and see Charter* v. *Watson*, (1899) 1 Ch. 175.) The arrears of interest recoverable is limited to six years'. (Real Property Limitation Act, 1833, s. 42.)

Redemption of Mortgage Estate.—The mortgagor or the assignee of or anyone interested in the equity of redemption (*Tarn* v. *Turner*, 39 Ch. D. 456) is entitled to redeem the mortgage estate by repaying the loan, together with all interest then due and costs (*Wales* v. *Carr*, (1902) 1 Ch. 860), on the day fixed by the mortgage deed for repayment. (*See* Strahan's Mort. Part I. 3.) If he permits that day to go past, he must give the mortgagee six months' notice of his intention to repay, so as to allow the mortgagee time to find another investment for the money, unless the mortgagee has demanded repayment or taken steps to enforce it, when immediate payment may be made. (*Smith* v. *Smith*, (1891) 3 Ch. 550.) The entering into possession of the mortgaged premises by the mortgagee is a demand for repayment within this rule. (*Bovill* v. *Endle*, (1896) 1 Ch. 648.)

On payment, the mortgagor is entitled to a reconveyance of the mortgaged estate. If the mortgagee refuses to accept payment, or refuses to reconvey the estate to the mortgagor, the latter has a remedy by an action of redemption. It is to be remembered that in such an action the Court can order a sale. (Sect. 25, Conveyancing Act, 1881.) By sect. 15 of the same Act, as amended by sect. 12 of the Conveyancing Act, 1882, the mortgagor, save when the mortgagee is in possession, can claim, instead of a reconveyance to himself, a transfer of the mortgage to any person whom he shall nominate.

Restrictions on Right to Redeem.—The right of a mortgagor to redeem cannot, as we have seen, be taken from him nor *clogged*, as the term is, by any condition which will render the mortgaged property less valuable to him after redemption than it was before he entered into the mortgage. (Strahan's Mort. Part II. Sect. I.; and see *Kreglinger* v. *New Patagonia Meat Co.*, (1914) A. C. 25.) This doctrine, however, applies only to conditions introduced into the mortgage itself or agreed to between the mortgagor and mortgagee contemporaneously with the execution of the mortgage. There is nothing to prevent a mortgagor from, subsequently to the execution of the mortgage, agreeing to sell his equity of redemption to the mortgagee. (*Reeve* v. *Lisle*, (1902) A. C. 461.) And subsequent events may without any express agreement restrict the right of the mortgagor to redeem. This is the case where the same mortgagor has granted two mortgages, and these two mortgages have practically become one by the operation of the doctrine of *tacking* or the doctrine of *consolidation*.

(a) *Tacking*.—The process called tacking applies in the case of several mortgages upon the same interest or estate. To explain it, it is necessary to consider, first, the rules as to priority of mortgages. (Strahan's Mort. Part II. Sect. III.)

The first point to be marked is that there can be only one legal mortgage of an interest in land, because a legal mortgage is a mortgage that transfers the legal title to the interest mortgaged, and there can be only one legal title. Accordingly, where there are several mortgages of the same interest, all of them, save one, must be equitable mortgages, and all of them without exception may be equitable mortgages. Whether there is or is not a legal mortgage among them does not matter if every subsequent mortgagee, when he advanced his money, was aware of the existence of the mortgage or mortgages already affecting the interest. In this case, the rule *Qui prior est tempore potior est jure* (*who is prior in time is better in right*) applies all round. The first mortgagee, whether legal or merely equitable, is entitled to be paid off first; the second second, and so on *seriatim*.

The case, however, is very different when the subsequent mortgagees were not aware, or *had no notice*, as the phrase is, of the existence of the prior mortgagees at the time they advanced their money. (Strahan's Mort. Part II. Sect. III.) Then a different rule applies: *where the equities are equal the law shall prevail*. Accordingly, if one of the mortgagees has the legal title, that is, is a legal mortgagee, he will be entitled to priority over all the others, that is, to have his mortgage paid off in full before any of the others have any claim to payment out of the mortgage estate. This priority he may, through negligence or fraud on his part, be deprived of; but, assuming honesty and reasonable care, a legal mortgage takes precedence of all equitable mortgages executed before it, of the existence of which the legal mortgagee was unaware at the time he advanced his money. (*Taylor* v. *London & County Banking Co.*, (1901) 2 Ch. 231; *and see Berwick & Co.* v. *Price*, (1905) 1 Ch. 632.)

Subject to the priority of the legal mortgagee—if there be one—the equitable mortgagees, who have advanced their money without notice of other mortgages, will, as between themselves, be entitled to be paid off in order of time, just as if they had such notice. If one of them, however, buys in the legal mortgage, or sells his equitable mortgage to the legal mortgagee, then this equitable mortgage will be joined to the legal mortgage, and will be entitled to priority over all other equitable mortgages, whether executed before or after it. The equitable mortgage is then said to be *tacked* to the legal mortgage. Both are henceforth regarded as one mortgage, alike for the purpose of priority over other mortgages and for the purpose of redemption; neither the mortgagor nor any of the equitable mortgagees can redeem the legal mortgage without redeeming also the equitable mortgage which has been tacked to it. (*Marsh* v. *Lee*, 2 Vent. 337; 1 W. & T.)

The same principle applies when the legal mortgagee, having no notice of the existence of equitable mortgages, makes a further advance to the mortgagor on the security of the same estate. This second advance he is entitled to tack to his legal mortgage, and to claim that both shall be paid off before any of the equitable mortgages of which he had no notice. (*Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491.) But if the legal mortgagee has notice of the existence of the equitable mortgage at the time he actually makes the further advance, he will not be entitled to tack this further advance to his legal mortgage, even though it was made in pursuance of an agreement to make it entered into before the equitable mortgage was made (*West* v. *Williams*, (1898) 1 Ch. 132); and where one only of several joint mortgagees has notice of the equitable mortgage, that is for purposes of tacking notice to them all. (*Freeman* v. *Laing*, (1899) 2 Ch. 355.)

In Ireland, the doctrine of tacking has been excluded by the operation of the Irish Registry Act. (6 Anne, c. 2 (Ir.).) That Act renders the registration of all assurances (which include equitable mortgages by memorandum (*Fullerton* v. *Provincial Bank of Ireland*, (1903) A. C. 309)) affecting land in Ireland compulsory, save only leases for periods not exceeding twenty-one years, where possession of the land goes along with the lease. Registered assurances are to take priority over all unregistered assurances or charges of which the owner under registered assurance had no notice when he advanced his money. The relative priority of registered instruments is made to depend on the time of their registration. The Courts have held that the effect of this latter provision is to prevent not merely the tacking of one registered mortgage to a prior one (*Latouche* v. *Dunsany*, 1 Sch. & L. 137), but also the tacking of a further advance made by a registered mortgagee on the security of the same estate without notice of an intermediate incumbrance. (*Tennison* v. *Sweeny*, 7 Ir. Eq. 511.)

By the Middlesex Registry Act, 1891, the law of tacking, as regards assurance of land in Middlesex, is made practically identical with the Irish law. Under the Yorkshire Registries Act, 1884, however, registered charges, in the absence of actual fraud (sect. 7; *see Battison* v. *Hobson*, (1896) 2 Ch. 403), are to take priority according to their date of registration, notwithstanding the owner of the registered charge had actual notice of an earlier unregistered charge. (Sects. 14 and 16.)

It may be noted that, in the case of land registered under the Land Titles and Transfer Act, 1875 (38 & 39 Vict. c. 87), registered charges are to rank according to the order in which they are registered, not in which they are created, subject to an entry to the contrary being made in the register. (Sect. 28.)

(b) *Consolidation.*—The process called consolidation applies in the case of several mortgages given by the same person on different interests or estates. Owing to recent alterations in the law, it is not now so important as formerly. (*See generally*, Strahan's Mort. Part III. Sect. IV.)

When the owner of several interests or estates granted separate mortgages on each of them to secure separate debts, then, provided he redeemed them at the times fixed in the deed for the repayment of the debts, he was entitled to redeem each estate separately, although all the mortgages were vested in the same person. If, however, he allowed that time to go by without redeeming two or more of them, and these were granted to or became vested in the same person, that person was entitled to refuse to let him, or his assignee of the equity of redemption, redeem one of the mortgages without, at the same time, redeeming the other or others. (*Pledge* v. *White*, (1896) A. C. 187.) The person holding the mortgages was then said to have *consolidated* the mortgages in question. If, however, they were originally granted to different persons and the mortgagor had assigned his equity of redemption in one of the mortgaged estates to a third person before the two mortgages became vested in one person, this would prevent any consolidation as against such third person. (*Minter*

v. *Carr*, (1894) 3 Ch. 498; *and see Hughes* v. *Britannia Permanent Building Society*, (1906) 2 Ch. 607.)

Where one interest was an ample, and another a scanty, security for the debt advanced on it, this right to consolidate was very valuable. It has, however, been very much limited in its application for the future by sect. 17 of the Conveyancing Act, 1881, which enacts that, as to mortgages, one or all of which were made after the commencement of the Act, a mortgagor shall be entitled to redeem one mortgage without paying any money due under any separate mortgage, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem, unless a contrary intention is expressed in the mortgage deeds, or one of them. (*See In re Salmon, Ex parte the Trustee,* (1903) 1 K. B. 147.)

B. *Mortgages by Deposit or Memorandum.*

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Deposit or Memorandum.—Equitable mortgages, as we have seen, arise in one of two ways. Firstly, through the mortgagor having nothing but an equitable interest to convey; or secondly, through his having used a form of conveyance or transaction recognized only in equity. We have dealt with those arising in the first way as far almost as is necessary, and we have had to deal to a certain extent with the second kind also in the preceding part. There are, however, a few points still to be referred to as to both kinds, but more especially as to the latter, or, as they are commonly called, mortgages by deposit of title deeds or by memorandum of deposit.

To effect a mortgage by deposit of title deeds, all that is necessary is that the borrower should hand over to the lender the title deeds to the interest in question (or sufficient of them to show title), or in the case of land registered under the Land Transfer Acts, 1875 and 1897, the land certificate issued under those Acts (sect. 8, Act of 1897), as security for the loan. (*Russel* v. *Russel,* 1 Bro. C. C. 269; 1 W. & T.) Usually a memorandum accompanies the deeds, setting out the object of the deposit, but this is not absolutely necessary. And a mortgage may even arise without an actual deposit if the mortgagor gives the lender a memorandum containing a promise to deposit the title deeds as security for the loan. (*See* Strahan's Mort. Part II. Sect. II.)

The only effect at common law of a deposit of title deeds as security for a loan is to make the Court refuse its aid to the depositor to recover the title deeds until he repays the loan. It transfers no interest in the land. Equity, however, treats a deposit of title deeds, or a memorandum promising to deposit them, as a valid mortgage of the land, and on failure of the depositor to pay the interest and loan, it will decree a foreclosure, and order the mortgagor to convey his interest in the mortgaged lands to the lender, six months being allowed for redemption. (*Marshall* v. *Shrewsbury*, L. R. 10 Ch. 254.) The powers of sale, appointment of receiver, &c., under sect. 19 of the Conveyancing Act, 1881, are to be implied only when the mortgage is by deed. But the mortgagee by deposit may in England, under sect. 25 of the same Act, and in Ireland under sect. 43, Sale and Transfer of Land Act, 1858 (21 & 22 Vict. c. 72), obtain an order for sale on application to the Court, if the Court see fit to grant it. And on his application the Court would always appoint a receiver. (*Bodger* v. *Bodger*, 11 W. R. 160.) On the other hand, the mortgagor by deposit has the same or rather a better right to redeem than the mortgagor by deed, since he is entitled to pay off the mortgage at any time without giving the mortgagee six months' notice (*Fitzgerald's Trustee* v. *Mellersh*,

(1892) 1 Ch. 385), and the same right as the mortgagor by deed to an order for the sale of the mortgaged estate under sect. 25, sub-sect. 1, of the Conveyancing Act, 1881.

A mortgagor by deposit, while in possession of the land, has—unless they are excluded by written agreement—all the powers of leasing implied by sect. 18 of the Conveyancing Act. (*See supra, p.* 206.)

Priority of Equitable Mortgages.—In considering the doctrine of tacking (*supra, p.* 217), we have already said nearly all that is necessary as to the order in which equitable mortgages of all kinds—for in this respect there is no difference among them—rank as regards the order in which they are to be paid out of the mortgaged estate. Two further points may be noticed. In the first place, as between mortgages where the subsequent ones were made without notice of the earlier ones, the earliest one may maintain, or any of the later ones may acquire, priority over the others, not merely by being tacked to the legal mortgage, but, if there be no legal mortgage, by being in any way attached to the legal title—as, for instance, by its owner acquiring the legal estate from the mortgagor. In the second place, all equitable mortgages are liable, as long as they remain equitable, to be postponed or defeated by a subsequent legal mortgage, or by a sale of the legal estate for value to a mortgagor or purchaser without notice of their existence. This all follows from the principle before referred to, that where the equities are equal the law shall prevail. (As to the effect of registration on priority, *see supra, p.* 219.)

The right to priority of a subsequent purchaser or legal mortgagee without notice is not destroyed by the fact that the legal estate was transferred to him through the fraud or breach of trust of the mortgagor, provided the purchaser or mortgagee had no notice of it at the time the legal estate was transferred to him. (*Taylor* v. *Russell*, (1892)

A. C. 244; *and see Perham* v. *Kempster*, (1907) 1 Ch. 373.) Fraud, however, on the part of a legal mortgagee, or negligence on his part which has enabled the mortgagor to commit a fraud on a subsequent mortgagee, is sufficient to postpone a prior legal mortgagee to even a subsequent equitable mortgagee (*Northern Counties of England Insurance Co.* v. *Whipp*, 26 Ch. D. 482); but not mere negligence, such as entering into the mortgage without insisting on the production of the title deeds, if he has inquired why these are missing and has received what he honestly thought a reasonable explanation. (*Agra Bank* v. *Barry*, L. R. 7 H. L. 135; *and see and cf. In re Greer* (1907), 1 Ir. R. 57; *Walker* v. *Linom*, (1907) 2 Ch. 104.) Mere negligence has, however, been held sufficient to postpone a prior equitable mortgagee to a subsequent one. (*Ferrand* v. *Yorkshire Banking Co.*, 40 Ch. D. 182.)

Forfeiture of Equity of Redemption.—There is one respect in which a mortgage by deposit differs from a legal mortgage and an equitable mortgage by deed. Under 4 & 5 W. & M. c. 16, if a mortgagor grants a second mortgage without disclosing the existence of the prior mortgage to the second mortgagee, he shall, as we have seen, lose his equity of redemption. This Act, however, being a penal one, has been construed strictly, and it has been held not to apply where the second mortgage was merely an advance on the security of the title deeds (*Kennard* v. *Futvoye*, 2 Giff. 81); nor where other lands not included in the prior mortgage were included in the second mortgage. (*Stafford* v. *Selby*, 3 Vern. 589.)

And by sect. 24 of the Law of Property Amendment Act, 1859, and sect. 8 of the Law of Property Amendment Act, 1860, the fraudulent concealment by any seller or mortgagor, or by his solicitor or agent, of any prior incumbrance from a purchaser or mortgagee is made a misdemeanour, and also renders the party so concealing it liable to an action for damages at the suit of the purchaser or mortgagee. Criminal proceedings under this enactment can be taken only with the sanction of the Attorney or Solicitor-General.

SUB-SECTION 2.

MORTGAGES OF GOODS.

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Mortgages and Pledges.—Personalty of an incorporeal kind, such as stock or shares in public companies, can be dealt with in the way of mortgage much on the same principles as apply to interests in land. With this species of property, however, we have at present nothing to do. Mortgages of equitable interests in personalty may also be made. In general the law of mortgage with regard to them is similar to that regulating mortgages of land subject to this difference, that priority among several mortgagees of the same interest rank, generally speaking, not according to the time the mortgages were made, but according to the time at which notice of them was given to the legal owners of the goods. This is called the rule in *Dearle* v. *Hall* (3 Russ. 1). (*See* Strahan's Mort. p. 85.) The same rule applies to mortgages of choses in action. (*In re Lake*, (1903) 1 K. B. 151.).

Mortgages of goods, or moveable physical objects, on the other hand, differ greatly in their nature from mortgages of land, owing partly to the difference in the nature of land and goods, and partly to special legislation.

Goods may be made a security for a loan, either by a transfer to the creditor of the possession without the legal ownership, or by a transfer of the legal ownership without the possession. In the first instance the security is called a *pledge*; in the second, a *mortgage*. In pledges or mortgages the rights of the parties, independent of statute, are much the same. The pledgor or mortgagor is entitled to redeem the article pledged or mortgaged, not merely at the time fixed for the repayment of the loan, but at any time afterwards, as long as the article remains in the mortgagee's or pledgee's hands; the pledgee—or *pawnee*—cannot foreclose the right of redemption, but both mortgagee and pawnee have a power to sell the article on failure of the other party to pay interest or principal of debt at the time fixed for repayment (*Carter* v. *Wake*, 4 Ch. D. 605), or if no time is fixed, then within a reasonable time. (*Deverges* v. *Sandeman, Clark & Co.*, (1901) 1 Ch. 70.) The rights of the parties, however, have been greatly altered by the Pawnbrokers Act, 1872, and the Bills of Sale Acts, 1878 and 1882, in England; and by the Act to establish the Business of Pawnbroker, 1786 (26 Geo. III. c. 43 (Irish)) and the Bills of Sale (Ireland) Acts, 1879 and 1883, in Ireland.

Pawnbrokers Acts.—With regard to the effect of the Pawnbrokers Acts on the general law of pledge, it will be sufficient here to state that, while the English and Irish Acts differ, both seek to regulate the rights of parties to pledges for small amounts by compelling the pawnbroker to keep records and give tickets as to such pledges, by limiting the amount of interest chargeable on the loan, and by setting out the powers of sale and forfeiture possessed by the pawnbroker and the rights of redemption possessed by the pledgor.

Bills of Sale Acts.—The Bills of Sale Acts of England (1878 and 1882) and Ireland (1879 and 1883) are practically identical. By a *bill of sale* is meant any written instrument by which the title to a chattel personal[1] is transferred from one person to another. When the transfer is intended to be an out-and-out assignment, the bill may be called an *absolute* bill of sale; when it is intended to be as a security for a debt or loan, it may be called a *conditional* bill of sale. The Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), applies to both absolute and conditional bills of sale, with many exceptions as to absolute bills. The Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), applies to conditional bills only. With absolute bills we have at present nothing to do. Conditional bills of sale, as the words are used in the Acts, practically embrace not merely bills which are transfers of ownership, but all transactions by which goods are made securities for debts while they are left in the possession of the debtor. Mortgages of ships are not within them. (*See Appendix D.*)

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[1] The title deeds to land are chattels personal, and may be made, independently of the land, the subject of a bill of sale. (*Swanley Coal Co.* v. *Denton*, (1907) 2 K. B. 873.)

Conditional bills of sale within the Acts must be bills (a) given as security for money; (b) on personal chattels; (c) which belong to the grantor of the bill at the time he makes it. (*Thomas* v. *Kelly*, 13 App. Cas. 506.) Such bill must be duly attested by a witness or witnesses not party to it, and registered at the Central Office of the Supreme Court within seven days from its making. An affidavit, which must not be made before the solicitor of the grantee or grantor (*Baker* v. *Ambrose*, (1896) 2 Q. B. 372), must at the same time be filed setting out (a) the date of making the bill; (b) the residence and occupation of the maker; (c) the residence and occupation of every witness attesting it; and (d) its due making and attestation. (Sect. 10, Act 1878.) If the bill be not duly registered and duly attested, or if it do not set out truly the consideration for which it was granted; or if that consideration be not, at least, 30*l*., the bill is void in respect of the personal chattels comprised therein. (Sect. 8.) And if it be not in substantial accordance with the form contained in the schedule to the Act it is void for all purposes. (Sect. 9; *Ex parte Stanford*, 17 Q. B. D. 259.) An inventory must be attached to the bill in which the goods contained in it are specifically described. To keep it alive the bill must be re-registered every five years.

A bill satisfying the Acts is a good mortgage or bill of sale of the goods contained in it, and the grantor of it is not entitled to sell or remove from the premises any of these goods. The grantee, however, is not entitled to seize them, save for the causes set out in sect. 7 of the Act of 1882. These causes are:—(a) default on the part of the grantor of the bill to pay money secured on the bill, or to fulfil any covenant or agreement in it necessary for maintaining the security; (b) the grantor becoming bankrupt or suffering the goods to be distrained for rent, rates, or taxes; (c) the grantor fraudulently removing or suffering the goods to be removed from the premises; (d) the grantor not producing, on the written demand of the grantee, his last receipts for rent, rates, and taxes; (e) the grantor having a judgment execution levied against his goods. On seizure for any of these causes, the grantor has five days to apply to the Court for an order on the grantee forbidding the sale or removal of the goods on payment of debt and costs, and seizure can in every case be prevented by tender of the debt and reasonable costs. Seizure for any other cause—even though under an express power contained in the bill—will be illegal.

When a conditional bill of sale is void under the Bills of Sale Acts, 1878 and 1882, the grantee is not altogether without a remedy. Merely his right to seize the goods included in the void bill is gone. His action as an ordinary creditor for the money which the bill was intended to secure still remains.

PART IV.

MODES OF ACQUIRING INTERESTS.

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Title.—The term "title" has, like most terms of English law, a variety of meanings. Sometimes it is used as equivalent to the ownership itself: thus we talk of a person having no title to a thing. Again, it is used as indicating the particular fact which vested the ownership in the then owner: that is its meaning when we speak of title by inheritance, for instance. Again, especially in real property, it is used as a description not merely of the particular fact which vested the ownership in the then owner, but all the series of facts by which the ownership was transferred from one person to another until it finally vested in the then owner: that is the meaning of it when we refer to a certain length of title.

All these meanings are very closely related to one another, and it will be necessary to use the term from time to time in each of them. But for the purpose of arranging the subject-matter of this Part we shall use it in the second sense only—that is, as referring to the particular fact which vested the ownership in the then owner.

Now title in this sense may arise in either of two ways. It may arise through a person being the first to assert or acquire ownership over a thing at that time unowned, or it may arise through the transfer to a person of the ownership of a thing by its previous owner. In the former case it may be called *title by original acquisition of ownership:* in the latter, *title by transfer of ownership.*

SECTION I.

TITLE BY ORIGINAL ACQUISITION OF OWNERSHIP.

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Original Acquisition.—Ownership may be originally acquired either through the taking possession, with the intention of acquiring its ownership, of a thing belonging to nobody, or through new additions being made by nature or industry to a thing already owned. The former mode of acquiring ownership is called *occupancy;* the latter, *accession.*

A. **Occupancy.**—Occupancy—that is, the taking possession with the intention of acquiring ownership of things belonging to nobody—may, as Blackstone repeatedly insists, have been the origin of all private property; but in long-settled countries like England there are few objects now worth occupying which have not long been occupied, and therefore owned. As far as land is concerned, the doctrine of occupancy does not apply, as all land not owned by private persons is by the theory of English law vested in the Crown. Formerly an exception to this occurred in the case of an estate *pur autre vie*, where the tenant died before the *cestui que vie*. The estate then, if there were no special occupant, became *res nullius*, and the first person who took possession was entitled to keep it till the death of the *cestui que vie* as general occupant, as he was called. (*See supra, p.* 60.)

The doctrine has a more extended application to goods and chattels. It is a principle of the common law, which has been somewhat modified by franchises such as free warren, &c. (*see infra, p.* 336), and somewhat altered by the Game Laws, that all wild animals, save such as are in captivity, are *res nullius*. Accordingly, they become the property of the first person who takes possession of them. The fisherman holds the fish he catches, the fowler the birds he shoots, by occupancy. Again, things formerly owned, but abandoned by their owner—that is, parted with or thrown away with the intention of giving up the property in them—become *res nullius*, and may be acquired by the first person who takes possession of them. And the goods of alien enemies—that is, the subjects of a country with which England is at war—are by international law *res nullius* to English subjects. Before, however, such goods can be taken possession of, the English subject must have the consent of the Crown. This is the ground on which privateering is legal. The rule as to property of alien enemies being *res nullius* does not extend to property brought by them into England before the war in question broke out. (Wheaton's International Law, Part IV., Chaps. 1 and 2.)

B. **Accession.**—Accession, that is, the addition by nature or industry of something new to a thing already owned, has a larger application in a settled country than occupancy. It is the title by which the husbandman owns the crops of his fields, the increase of his flocks, the eggs of his poultry. The fruit of animals belongs to the owner of the female. This rule is subject to a curious exception. It is said that cygnets belong not to the owner of the hen, but to the owners of both birds equally. (7 Rep. 17.)

The doctrine of accession is usually considered as applicable, not merely to the produce of land, but to land itself. Thus, when an island rises in a non-tidal river, it is presumed to belong in equal parts to the riparian owners on each side if it rises in the centre, while if it rises on one side it is presumed to belong to the riparian owner on whose side it arises. But this is not an acquisition of ownership at all. The island is presumed to belong to the riparian owners because the bed of the river is presumed to belong to them. That presumption may be rebutted by showing, for instance, that a third person has a several fishery (*see infra*, p. 337) in the river, and then the bed would be presumed to be his (*Ecroyd* v. *Coulthard*, (1898) 2 Ch. 359), and so would an island rising in the river. (*See Hindson* v. *Ashley*, (1896) 2 Ch. 1.)

Again, if a river gradually washes away the mould from one side and transfers it to the other, the owner of the latter side is entitled to the additions to his land by *alluvion*, which is a mode of accession. The principle here, however, is *de minimis non curat lex;* for it seems that if a storm carries away a considerable portion of one bank and transfers it to the other, the ownership of the soil carried away remains in the original owner.

Much the same principles apply in the case of the seashore. The foreshore—that is, the part of the shore between high and low water-mark—generally, and the bed of the sea for three miles round the coast, always belong to the Crown. If the tide gradually retreats, the new land belongs not to the Crown, but to the owner of the land adjoining the shore; if it retreats suddenly, or if an island arises in the sea, it belongs to the Crown. (2 Bl. Com. 261. *See Attorney-General for Ireland* v. *McCarthy* (1911), 2 Ir. R. 260.)

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TITLE BY TRANSFER OF OWNERSHIP.

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Modes of Transfer.—Title by transfer of ownership may arise either through the ownership being transferred by the voluntary and intentional act of the owner, or by the law transferring the ownership not by the owner's wish or desire, but in consequence of a certain fact or event. The former mode of acquiring ownership may be called *transfer by act of owner*; the latter, *transfer by operation of law*.

SUB-SECTION I.

TRANSFER BY ACT OF OWNER.

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Preliminary Remarks.—We may notice, as a preliminary to the consideration of transfer by act of owner, that it is a principle of the common law that no one can give a better title than he himself has, or, as the maxim puts it, *nemo dat quod non habet*. This means that if A. has in relation to a thing no right of ownership, or an imperfect right of ownership, A. cannot, by transferring the thing to B., give B. any better or greater right of ownership than A. himself possesses. This, it is to be observed, is a common law rule, and, as we have already seen, does not always apply in equity. And even at common law a considerable number of important exceptions have been made to it. These have been generally made for the benefit of commerce, and most of them apply to the sale of the objects of commerce—goods. (*See infra, p.* 260.)

While an owner can, as a rule, never give a better title than he himself has, any disposition he makes is good against him, even though he receives nothing in return—*no valuable consideration*, as the technical phrase is. Such a disposition is said to be *voluntary*. Formerly, if the subject-matter of the gift was land, the voluntary grantor might afterwards sell the land for value; and if he did so, the ownership of the land was taken out of the voluntary grantee and vested in the grantee for value. (27 Eliz. c. 4.) This, however, has been altered by the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21).

But while a voluntary grant of land or goods is now in all cases binding on the grantor as soon as the transfer is complete, yet in many respects it does not convey the same title to the grantee as a grant for value would. For instance, in the case of goods it never cures a defective title, as a sale sometimes does. (*Infra, p.* 260.) Again, if the voluntary grantor becomes bankrupt after making the grant, the voluntary grant may, under certain circumstances, be set aside in favour of the grantor's creditors. (*Infra, p.* 304.) And lastly, if the immediate effect of making a voluntary grant is to render the estate of the grantor insufficient to pay his debts, it will be void as against his creditors as being made for the purpose of delaying or defeating them within the meaning of 13 Eliz. c. 5, s. 5. (*Freeman* v. *Pope*, L. R. 5 Ch. 538; *and see In re Holland, Gregg* v. *Holland*, (1902) 2 Ch. 360.)

Alienations inter vivos and mortis causâ.—When the ownership of a thing is being transferred by the act of the owner, the transfer of ownership may be fixed to take place during the owner's life or at his death. Title, then, arising from the act of the owner may be divided according as it arises by *alienation inter vivos* or by *alienation mortis causâ*.

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Alienation of Land and Goods.—This great and obvious distinction exists between land and goods: Land is an actual part of the realm; goods, however valuable and important, are not—they are moveables, and as such have no local habitation. This distinction is recognized in the rule which gives the ultimate ownership of all land to the king as representing the State, in the rule which formerly forbade a foreigner to own land (*see infra, p.* 385), and in many other rules of English law. Nowhere is it more noticeable than in the law as to alienation by the act of the owner *inter vivos*.

Land being part and parcel of the realm, its ownership is a matter of public concern. Accordingly, it is, and has always been, the policy of the law to insist that all dealings with the ownership should be open and notorious, and that clear evidence of them should be preserved. To secure this, it has from the earliest times made interests in land transferable only in certain formal modes. The most ancient of these modes is feoffment with livery of seisin, which is coeval apparently with English law; and the most modern is transfer by registration under the Land Transfer Acts, 1875 and 1897.

The law has no such interest in the ownership of goods, and accordingly it has never been the policy of the law to insist on interest in goods being transferred in a formal manner. To this day, mere tradition or delivery, with an intention to pass the ownership, is sufficient to give a good title to the thing handed over, however valuable it may be. Any requirements of the law as to writing, or other evidence of a transaction relating to goods, are for the purpose not of protecting the public interest in them—for there is nothing of the kind—but of securing honest dealing between the parties. An exception occurs in the case of ships, the ownership of which, owing to their importance from an international point of view, is a matter of public interest. Special provisions, accordingly, have been made as to the registration of all dealings with property in them. (*See Appendix E.*)

Title to Land and Goods.—Another great distinction between land and goods is that to which we have had occasion so often to refer—the existence at common law of limited interests in land and of only absolute interests in goods. This difference has rendered necessary, for the protection of purchasers, a far more thorough investigation of title in the case of purchases of land than in the case of purchases of goods. The possession of goods may be taken as *primâ facie* evidence of absolute ownership; the possession of lands is consistent with a very limited ownership. Hence, in a conveyance of lands for value, the purchaser may, in the absence of any stipulation to the contrary, insist upon the vendor deducing his title (that is, setting out all dealings with the lands) during a period sufficiently long to render it reasonably certain that the vendor is actually capable of conveying fully the interest which he purports to convey. On a sale of goods the purchaser has no such right.

Another distinction between land and goods is this:—The doctrine of *lis pendens* applies to land: it does not apply to goods. (*Wigram* v. *Buckley*, (1894) 3 Ch. 483.) The doctrine of *lis pendens* arose out of the old system of real actions for the recovery of land. As has been pointed out, these gave the successful litigant the land itself; while in actions for the recovery of goods, the judgment was merely for the goods or their value. Accordingly, if land the subject-matter of an action or suit in equity was sold pending the action, it was bound in the hands of the purchaser by the result of the action. (Co. Litt. 344 b.) This is the doctrine of *lis pendens*. As it operated hardly upon persons who had purchased for value without notice of the pending action, it was enacted that no *lis pendens* shall affect land until it is registered, and the registration is to be renewed every five years (2 & 3 Vict. c. 11, s. 7), and by a subsequent Act (30 & 31 Vict. c. 47, s. 2) the Court can compulsorily vacate the registration of the *lis pendens* on the determination of the action, or if it thinks the action is not being prosecuted *bonâ fide*.

Modes of Alienating.—The existence of public interest and of limited ownership at law in land, and its subjection to the doctrine of *lis pendens*, have made the legal modes of alienation applicable to it very different from the legal modes of alienation applicable to goods. In equity, at one time, the same modes of alienation were applicable equally to land and goods, but even here a distinction was introduced long ago by the Statute of Frauds. We will now deal only with legal modes of alienation, because we have already sufficiently dealt with equitable modes, and because in practice the legal modes of alienation are also habitually employed to create and transfer equitable interests.

Differing so greatly as they do, it will be necessary to consider separately the legal modes of alienating land and of alienating goods.

I. *Alienation of Land.*

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Agreement to Alien.—Before the actual conveyance takes place there is always in practice an agreement to convey. This agreement, or contract of sale, in order to be enforceable against the parties to it, must be made for value, and must, by sect. 4 of the Statute of Frauds (29 Car. II. c. 3), be in writing, signed by the party to be charged. The writing should describe the land agreed to be sold, but if it is described generally, parol—or oral—evidence will be admitted to identify the particular plot to which the agreement refers. (*Plant* v. *Bourne*, (1897) 2 Ch. 281; *and see McMeekin* v. *Stevenson* (1917), 1 Ir. R. 348.) If, moreover, in pursuance of a parol agreement to alien, the purchaser enters upon the land, the Court of Chancery will regard this as part performance of the agreement, and will compel the giving or receipt of a grant in the terms verbally agreed upon. (*See Hudson* v. *Henland*, (1896) 2 Ch. 428; *and* Strahan's Eq. Art. 102.)

Abstract of Title.—As we have already said, in a conveyance of lands for value, the purchaser may, in the absence of any stipulation to the contrary, insist upon the vendor's deducing his title during a period sufficiently long to render it reasonably certain that the vendor is actually capable of conveying fully the interests he purports to convey. Such a narrative of the dealings with the land conveyed is called an *abstract of title*. The purchaser may in general, and subject to any stipulation to the contrary in the contract of sale, require that the abstract shall be carried back for forty years. (Vendor and Purchaser Act, 1874, s. 1; *and see and cf. Bolton* v. *London School Board*, 7 Ch. D. 766; and *In re Wallis and Grout's Contract*, (1906) 2 Ch. 206.) However, his general right to have a complete title shown during the whole of this period, and to rescind his contract of sale if it be not so shown, is, in practice, often curtailed by special stipulations called the conditions of sale. (*In re Scott and Alvarez's Contract*, (1895) 2 Ch. 603.)

Covenants for Title.—In addition to this investigation of the title, a purchaser can, in the absence of a contrary stipulation, insist upon the vendor entering into *covenants for title*. The practical effect of these is to give the purchaser a right of action for damages against the vendor, in case the purchaser is disturbed in his possession of the land by reason of any defect of title against which the vendor covenants, or by reason of the vendor's refusal to do any act reasonably necessary for perfecting the conveyance. Prior to 1882, such covenants were set out at length in the conveyance. The ordinary covenants in a conveyance of freeholds for value by an owner beneficially entitled were the following:—(1.) Covenant for *right to convey*, *i.e.*, that the parties conveying have power to convey the property to the purchaser for the estate expressed to be limited; (2.) Covenant for *quiet enjoyment* against any lawful disturbance of the purchaser in his enjoyment of the property; (3.) Covenant for *freedom from incumbrances*, *i.e.*, that the land is not subject to any undisclosed charge; (4.) Covenant for *further assurance*, *i.e.*, that the vendor will, on being required by the purchaser, do all further acts reasonably necessary for more perfectly assuring to the purchaser the lands conveyed. It is to be noted that all these covenants were *qualified*, that is. extended only to the acts and omissions of the vendor himself, of those through whom he derived his title otherwise than by way of purchase for value, and of persons claiming under him or them.[1] If the land conveyed were leasehold, a further covenant was added, viz., (5.) for the *validity of the lease* under which the vendor held. (*See* Strahan's Convey., Part II. Sect. IV.)

In conveyances made after the 31st December, 1881, the Conveyancing Act, 1881, s. 7 (1) (A), of that year provides that these covenants shall be implied by the use of the words "as beneficial owner" to describe the character in which the vendor conveys. If the grantor is expressed to convey "as trustee" or "as mortgagee," only a covenant against incumbrances of his own creation, and if "as settlor" only a covenant for further assurance, is implied. (Sect. 7 (1) (F) and (E).)

Freehold and Chattel Interest.—Freehold interests, as we know, were originally the only interests in land recognized by the law. They, and they alone, were real ownership or part of the real ownership of the land. Chattel interests were originally not recognized by law at all, and when by force of statute they were recognized as interests in the land, they were not regarded as part of its real ownership. They were regarded as rights of user merely, and they were treated as if they were not interests in land, but were merely goods. Accordingly, the old formal contracts which the law required for the transfer of the ownership of land applied only to transfers of freehold interests. Chattel interests, not being common law interests in land, could be transferred as informally as interests in goods. Any formalities now required for the valid transfer of chattel interests are in consequence of comparatively recent Acts of Parliament.

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[1] This is commonly called covenanting against the acts and omissions of the vendor, his ancestors and testators and anyone claiming through him or them. For the difference between qualified covenants and absolute covenants or warranties, *see* Stra. Convey. p. 72, note (*a*).

Freehold interests, again, as being parts of the real ownership of the land, carried with them the seisin—that is, the full possession at law; chattel interests, not being parts of the real ownership, did not carry with them the seisin. The Statute of Uses only operates in those cases where the feoffee to uses is *seised* of the land, that is, has a freehold interest in it. The use, however, declared on his seisin need not be of a freehold interest; provided the feoffee to uses has vested in him a freehold interest, any use of the land—whether it is a chattel or a freehold estate—will be executed by the statute. Thus, if A. is seised in fee simple to the use of B. for a term of years the statute will, immediately on the creation of such use, vest the legal estate in the land for such term of years in B. But if A. himself had only a term of years, then the use to B. created on such terms would not be executed by the statute: the legal estate would remain in A., and B. would have an equitable interest only in the term. This restriction on the operation of the statute practically confined the modes of alienation arising under it to freehold interests.

Modes of Alienation.—Freehold interests in possession were at common law alienable by (a) *feoffment with livery of seisin*; (b) *release*; (c) *surrender*; (d) *exchange*; and (e) *partition*. Most of these have already been referred to, and here it will be necessary to deal only with the first and second of them. Under the Statute of Uses freehold interests could be alienated either by (a) *bargain and sale*, or (b) *covenant to stand seised*. There was a further mode which operated partly under common law and partly under the statute, and this was called *lease and release*: here the legal title to the lease was transferred by the statute on the bargain and sale of the lease, and the release operated at common law to transfer the freehold in the land leased. These then were, and still are, modes of conveying freehold interests in possession in land.

But future freehold interests in land could always at common law be alienated in a mode different from any of these, though, as a matter of fact, for good reason they seldom were so transferred.[1] This mode was by *deed of grant*. Freeholds in possession were said to lie in livery; freeholds in expectancy, being incorporeal hereditaments, lay in grant. By the Real Property Act, 1845, s. 2, it is enacted that freeholds in possession shall lie in grant as well as in livery. Since this enactment, conveyance by deed of grant has practically superseded every other mode of conveying freehold interests of all kinds.

The same statute which made a deed of grant sufficient to create or transfer freehold interests of all kinds made a deed necessary to create or transfer every chattel interest in land for the creation or transfer of which an instrument in writing had hitherto been necessary. (*See infra, p.* 249; and as to Ireland, *see Appendix B.*) The usual mode, then, of creating and transferring both freehold and chattel interests has come to be by deed. But a deed granting a chattel interest is not called a deed of grant, but a *lease*, and a deed transferring a lease already granted is called an *assignment of a lease*. And though deeds of grant and leases and assignments under seal are drawn and construed in much the same manner, still there is (as will be seen) much difference in the operation of each respectively. (For a short sketch of the evolution of the modern mode of conveyancing, *see* Strahan's Convey. Part II. Sect. I.)

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[1] The reason was that when conveyed by grant it was necessary, in order to make the grant a good conveyance, to prove the existence of the particular estate at the date of the grant, as otherwise there would be no evidence that the interest intended to be conveyed was future at all. The usual mode of conveying reversions and remainders was by lease and release, or bargain and sale, these modes of conveyances being equally effective whether the estate intended to be conveyed was or was not in expectancy at the date of conveyance.

(a) **Feoffment.**—Feoffment is the earliest form of conveyance. The essential part of it was *livery of seisin*, that is, the public delivery of the feudal possession of the land with a declaration in apt words of the extent of the estate intended to be conveyed. There were two kinds of livery of seisin—livery *in deed* and livery *in law*. Livery in deed was made on the land itself in the absence of any third person having or claiming any interest in the land. Usually the delivery of the land was shown by the feoffor (or grantor) handing over something taken from the land —as a turf or twig—to the feoffee (or grantee) (but it is not clear that this was necessary to a valid feoffment), and actual entry on the land by the feoffee. (*Sharp's Case*, 6 Rep. 26.) This livery was sufficient to pass not merely the land on which it was made, but all the feoffor's land in the country, if so intended. Livery in law was made in sight of the land of which possession was therefore not actually given. Until the feoffee made either entry in deed or entry in law (that is, by going to the land and claiming possession) no legal estate passed to him under a livery in law.

As has been said, the feoffor, in delivering the seisin, declared in apt words the estate in the land that was intended to be conveyed; and if the feoffee was to hold the land on uses, these were then declared too. This declaration was often put into writing and sealed by the feoffor. The writing was then called a *charter* (or, as we would now say, *deed*) *of feoffment*. Such writing was not necessary to the validity of the feoffment, though its utility in other respects was, of course, obvious. At last, in the reign of Charles II., Parliament, by sect. 1 of the Statute of Frauds, 1677, provided that an estate or interest made or created by livery of seisin only, and not put in writing and signed by the parties so making or creating the same, should have the force and effect of estate at will only. As will be seen, this enactment did not require the writing to be sealed; but now, by the Real Property Act, 1845, s. 3, a feoffment must be evidenced by deed, save in cases where the feoffment is made by an infant under a special custom (*see infra, p.* 378), where a writing not under seal is still sufficient evidence of the feoffment.

As since the Real Property Act, 1845, a deed is necessary to make a feoffment effective, while a deed is itself sufficient for all purposes without any feoffment, alienation by livery of seisin has ceased in practice altogether. But before that Act it had been superseded as between individuals by conveyance by lease and release. Sometimes it was used in conveyances by corporations, the reason being that the Statute of Uses did not operate on uses arising on land held by corporations. Accordingly, corporations could not convey by lease and release, since if they bargained and sold a lease for a year the statute did not transfer the legal estate in the land to the lessee.

A peculiar effect of a feoffment was what is known as its *tortious* operation. If a person in possession of land, not having any interest at all in it or having only a limited interest granted by feoffment, the fee simple, or a freehold estate larger than he himself possessed—assuming he had any estate—such feoffment operated tortiously or by wrong to convey the estate granted to the feoffee. If the estate granted was the fee simple, the feoffee took a fee simple by wrong; if it was a lesser estate, the feoffor—though before the feoffment he had no estate in the land—became by wrong the reversioner in fee of the feoffee. In either case, the whole title to the land was by the tortious feoffment taken out of the real owner. (Co. Litt. 330 b, note (*l*).) The making of a tortious feoffment was, however, a cause of forfeiture of any interest in the land which the feoffor might have, and entitled the real owner immediately to enter into possession and determine the wrongful estate created by the feoffment. If, however, the real owner waited until the tortious feoffee died, he could determine the wrongful estate only by a real action. It is now provided by the Real Property Act, 1845, that after the 1st October of that year a feoffment shall not have any tortious operation.

(b) **Bargain and Sale.**—A bargain and sale was simply a contract of sale of an interest in the land. When such a contract was made and the purchase-money paid, the bargainor, as he was called, was considered by the Court of Chancery to hold the land to the use of the bargainee for the interest bargained to be sold until formal conveyance was made. Then, upon the passing of the Statute of Uses, that statute executed this use in favour of the bargainee, that is, gave him the legal title to the estate bargained and sold. This obviously furnished a most private method of conveyance. An attempt to defeat it was made by the Statute of Enrolments, 1536, which provided that every conveyance by bargain and sale of freehold lands should be enrolled in a court of record within six months of its date.

A bargain and sale required a pecuniary consideration to support it, which consideration had to be *bonâ fide*.

When a testator directed his executors to sell his land, not at the same time devising the land to them, the executors thereby acquired a common law power of alienation, the exercise of which enabled them to transfer the land without themselves having any estate in it. The conveyance under this power was made by bargain and sale, which, in this case, did not require enrolment. Nor was a deed necessary; the estate was held to pass to the alienee by force of the will.

(c) **Lease and Release.**—The Statute of Enrolments, 1536, referred only to bargains and sales of freehold.

If, however, the owner of land in fee simple bargained and sold (for value received) the land for a year, or other chattel interest, a use was raised in favour of the vendee which the Statute of Uses, 1535, would execute. This then would not require enrolment under the statute. But once a person was in possession of the land for any legal interest, all that was necessary to do to convey to him the fee, or any other freehold estate in the land, was for the owner of such estate to convey it to him by release. He was in possession, and therefore at common law there was no need to deliver possession to him. Taking advantage of this. landowners began to bargain and sell leases of land to vendees for one year, and the next day convey the fee to them by deed of release.

This mode of conveying was called lease and release, and, as it needed neither livery of seisin nor enrolment, it soon became the usual mode of granting freehold interests. It was provided by 4 & 5 Vict. c. 21, that a release of freehold estate made after the 15th of May, 1841, and expressed to be made in pursuance of that Act. should be as effectual as if a lease for a year had preceded it. However, shortly afterwards the Real Property Act. 1845, was passed, and conveyance by release was superseded. A release, however, still is in use in three cases:—

(i.) for conveying the remainder or reversion to the person having the estate in possession, so as to produce merger;

(ii.) between joint tenants and coparceners;

(iii.) for extinguishing rights over land less than the full ownership, by conveyance thereof to the owner.

(d) **Covenant to stand Seised.**—This was an agreement made upon *good* consideration that the covenantor would henceforth hold the land in possession to the use of the covenantee. Upon this the Statute of Uses operated so as to execute the use—that is, to give the legal estate to the covenantee. Good consideration is said to be the consideration of blood or marriage: the covenant is expressed to be made in consideration of the natural love and affection of the covenantor towards one who is either a blood relation or the husband or wife (or intended husband or wife) of a blood relation. Covenants to stand seised do not require enrolment under the Statute of Enrolments, 1536. They are now quite obsolete in practice.

(e) **Deed of Grant.**—Since the Real Property Act, 1845, s. 2, deed of grant has become the usual mode of conveyance of freehold interests both in possession and in expectancy.

A *deed* is an instrument in writing under seal. (*See* Strahan's Convey. Part I. Sect. V.) It is expressed to be "signed, sealed, and delivered" by the parties to it. *Delivery* is effected by the party touching the seal and using some such words as "I deliver this as my act and deed"; and in practice the fact of such signature and delivery is always *attested* by one or more witnesses. A deed takes effect from the time of its delivery; it may, however, be delivered subject to some condition, in which case it is inoperative until the condition be performed, but then takes effect as from the original delivery. A deed so delivered is called an *escrow*. If there be only one party to a deed, it is called a *deed-poll;* if more than one, an *indenture*. A deed which transfers any interest in property must, under the Stamp Act, 1891, ss. 54 and 55, bear a stamp representing a value proportionate to the consideration given for the property conveyed.

A deed of grant is drawn up in a few simple sentences. No punctuation is used, but instead each new sentence is begun by the phrase "Now this indenture witnesseth," in capital letters. It proceeds upon a regular form or framework, which enables anyone acquainted with deeds of grant to turn at once to any portion of it which he wishes to consult without searching for it throughout the whole instrument. In a deed of grant in which all the parts are fully set out, this form is as follows: (a) *Date;* (b) *Parties;* (c) *Recital of title;* (d) *Recital of contract;* (e) *Testatum;* (f) *Consideration;* (g) *Receipt;* (h) *Operative words;* (i) *Parcels;* (j) *Habendum;* (k) *Estate;* (l) *Covenants.* In practice, however, (c) and (d) are often omitted, especially where the property transferred is small. (The form and effect of a deed of grant can be understood only by means of a precedent and an explanation of each clause of it. For this *see* Strahan's Convey. Part III. Sects. I.—IV.)

(f) **Lease.**—A lease is the first mode in which chattel interests in land are acquired. It applies to the creation of a leasehold interest out of an estate of freehold or out of another leasehold interest larger in point of duration. It is sometimes called a *demise.*

A *lease*, then, may be defined as an assurance whereby the possession of land is granted by one person (called the *lessor*) to another (called the *lessee*) for an interest smaller in point of duration than the lessor's, in consideration usually of a money payment at fixed periods, called the *rent.* At common law this grant gives rise to no estate until it is followed by entry of the lessee on the land: till entry the lessee has only an *interesse termini*, an interest in the term; that is, a right to enter. (*See Mann, Crossman & Paulin* v. *Registrar of Land Registry*, (1918) 1 Ch. 202.) This *interesse termini*, however, like a mortgagor's equity of redemption, is transferable and devolves as an estate. But if the lease is one by bargain and sale taking effect under the Statute of Uses, entry is not necessary to complete the lessee's title. (*See Wallis* v. *Hands*, (1893) 2 Ch. 75.)

Form of Lease.—Since the common law regarded a lease as merely a contract between lessor and lessee, it could be made by word of mouth, or by parol, as it is called. However, the Statute of Frauds, 1677, ss. 1, 4, provided that a lease for a period of more than three years, or on which the rent reserved was less than two-thirds of a rack rent, should, if not made in writing, only give rise to an estate at will: and, as we have seen by the Real Property Act, 1845, a lease that previously had to be in writing must now be by deed. For precedent of a lease, *see* Strahan's Convey. Part III. Sects. V., VI. Agreements for leases are within sect. 4 of the Statute of Frauds, and so must be in writing; though, not being within the Real Property Act, 1845, they need not be by deed. Accordingly it often happens that when an instrument intended to be a lease is void as a lease through not being by deed, the Courts will hold it good as an agreement for a lease. (*Parker* v. *Taswell*, 27 L. J. Ch. 812.) And if the tenant takes possession of the land under a parol agreement for a lease or under a lease void through not being by deed, the Court will compel the lessor to grant him a valid lease in the terms of the parol agreement or lease. (*Lester* v. *Foxcroft*, Coll. Par. Cas. 108.) When the lessee enters into possession under such an agreement or lease, the rights and liabilities of lessor and lessee are the same as if the lease had actually been granted (*Walsh* v. *Lonsdale*, 21 Ch. D. 9); in other words, the lessee holds under the terms of the draft lease or parol agreement. As Lord Esher put it in *Swain* v. *Ayres* (21 Q. B. D. 293), "when there is such a state of things that a Court of Equity would compel specific performance of an agreement for a lease by the execution of a lease, both in the Equity and Common Law Divisions the case ought to be treated as if such a lease had been granted and was actually then in existence. . . . The tenant must be treated in law as holding on the same terms that would be introduced into a lease executed in pursuance of the terms of the agreement for a lease."

The chief incidents both of leases for lives which convey freehold interests, and of leases for years or other time certain which convey chattel interests, have been already set out. All that need now be referred to is the different kinds of rents reserved, and of covenants to be found, in leases.

Kinds of Rent.—In ordinary agricultural leases the rent reserved is generally a fixed sum. In mining leases it is generally a royalty, that is, a sum varying with the quantity of minerals, &c. raised by the lessee; though in these cases there is usually a fixed minimum sum also reserved, called a *dead rent*. A *peppercorn rent* is a nominal rent; it is generally the rent reserved in building leases during the first few years of the tenancy while the buildings are still in course of erection. A *rack rent* is the full annual value of the land including all improvements. (Strahan's Convey. Part III. Sect. V.)

Covenants in Leases.—A lease almost invariably contains agreements both by the lessor and lessee for the better securing that the value of the land demised shall be kept up, and for facilitating the lessor's remedy against the lessee in certain events.

(1.) *Covenants by the Lessor.*—It would seem that from the use of the word "demise" the law implies (unless such implication is excluded by express covenants) a covenant for quiet enjoyment, and also, perhaps, a covenant for title[1] (*Hart* v. *Windsor*, 12 M. & W. 68), while without that word a mere agreement to let implies a covenant for quiet enjoyment. (*Markham* v. *Paget*, (1908) 1 Ch. 697.) It is doubtful whether either of these covenants is "unqualified"—that is, makes the lessor liable to compensate the lessee for acts done in contravention of them by any person whatever. (*Burnett* v. *Lynch*, 5 B. & C. 589; *but see Baynes & Co.* v. *Lloyd & Sons*, (1895) 2 Q. B. 610; and *Jones* v. *Lavington*, (1903) 1

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[1] As to Ireland, *see* sect. 41 of the Landlord and Tenant (Ireland) Act, 1860.

K. B. 253.) As the liability of the lessor implied from the word "demise" is so uncertain, it is the practice to insert express covenants by the lessor for title and quiet enjoyment, and "qualified," that is, limiting the lessor's liability to his own acts or those of his ancestors and testators, and of persons claiming through him or them. These express covenants, therefore, do not guarantee the lessee against eviction by title paramount.

(2.) *Covenants by the Lessee.*—There are a number of covenants on the part of the lessee called "usual covenants," upon the insertion of which in a lease the landlord can insist without any express stipulation in the agreement to lease to that effect. What are usual covenants would, it seems, vary from time to time with the practice of conveyancers (*per* Jessel, M. R., in *Hampshire* v. *Wickens*, 7 Ch. D. 555; *cf. In re Lander & Bayley's Contract*, (1892) 3 Ch. 41), but at the present day they seem in an ordinary lease to be limited to the following:—

(a) Covenant to pay the rent;

(b) Covenant to pay rates and taxes upon the property, except landlord's property tax and tithe rent-charge;

(c) Covenant to keep and deliver up the premises in repair;

(d) Covenant giving the lessor a right to enter at intervals upon the premises for the purpose of inspecting their state of repair. (*See* Dav. Prec., Vol. V., Pt. 1, p. 51.)

As has been said, these are the only covenants which can be insisted upon on an "open contract"; but there are a few others which are frequently inserted. Of these, the commonest are covenants by the lessee to insure the premises, not to commit waste, not to use the premises in particular ways, and not to assign or underlet the premises without the lessor's permission. (*See* Strahan's Convey. Part III. Sect. V.)

As to waiver of covenants and relief in case of their breach, *see p.* 90, *supra.*

Covenants running with the Land.—Of the lessee's covenants, all the implied and some of the express "run with the land," that is, can be enforced by the lessor against not merely the original lessee, but also against his assigns. The general rule as to express covenants is, that covenants relating to something in existence on the land can be enforced against the assigns without their being named in the covenant; covenants relating to something not yet in existence, but which, when it comes into existence, will relate to the land, can be enforced against the assigns only if they are named in the covenant; covenants merely collateral, that is, relating to something not connected with the land, cannot at common law be enforced against the assigns even if named in the covenant.[1] (*Spencer's Case*, 5 Co. 16; 1 Sm. L. C. 72.) In the same way assigns of the lessor can take advantage of covenants relating to the land entered into by the original lessee with the original lessor. (*See* 32 Hen. VIII. c. 34; Conveyancing Act, 1881, ss. 10, 11; *In re Robert Stephenson & Co.*, (1918) 1 Ch. 802; Conveyancing Act, 1911, s. 2.)

(g) **Assignments of Leases.**—Assignments of leases come within sect. 1 of the Statute of Frauds, and therefore must be in writing, and they come within sect. 3 of the Real Property Act, 1845, and must therefore be by deed. Where, however, it is wished to transfer a term of less than three years, this is usually done by the tenant surrendering it to the landlord, and the landlord re-granting it to the new tenant. This, however, is not an assignment, but a new lease. And if the lessee of a term—

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[1] Restrictive covenants, though collateral, run in equity with the land. (*See Tulk* v. *Moxhay*, 11 Beav. 571; Conveyancing Act, 1911, s. 11; Strah. Eq. pp. 466—468.)

whether long or short—does not transfer the whole term to the new tenant—that is, if he reserves a **reversion** even of a single day—that is not an assignment, but the grant of a sub-lease. If, on the other hand, he grants away the whole term, that is an assignment, whether he intends it or not. (*Beardman* v. *Wilson*, L. R. 4 C. P. 57.) In Ireland, however, a tenant may make a sub-letting of his *whole* interest, which shall not be an assignment. (*See* sect. 3, Landlord and Tenant (Ireland) Act, 1860; and *Seymour* v. *Quirke*, 14 L. R. Ir. 97.)

The distinction between assignments and sub-leases is important, since an assignee is liable to the original lessor for the breaches of those covenants which run with the land, while a sub-lessee is not personally liable to the original lessor, but to the sub-lessor, for breaches of covenant in the lease. (*Beardman* v. *Wilson*, *supra*.) And the distinction between a sub-lease and a new lease is important, since in the latter case the old lessee at once ceases to be liable under the covenants in the original lease. (*See infra*.)

Notwithstanding the assignment, the original lessee still remains liable to the lessor (even though the lessor has accepted rent from the assignee) for the performance of the covenants entered into by him.[1] Accordingly, he can insist on the assignee entering into a covenant to pay the rent and perform the covenants and conditions in question and to "save the vendor harmless," indemnify him that is, against any breaches by him or subsequent assigns. (*See* *Poole & Clarke's Contract*, (1904) 2 Ch. 173.)

The form of an assignment is practically the same as a conveyance of freeholds. (*See* Strahan's Convey.

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[1] It is sometimes otherwise in Ireland. Under sect. 16 of Landlord and Tenant Act, 1860, if the landlord has testified his consent to the assignment in the prescribed form, he is deemed to have released the original lessee. And independently of this section, the original lessee is relieved from liability where an assignee of his interest in possession obtains an order fixing a fair rent under sect. 1 of the Land Act, 1887.

Part III. Sect. VI.) As to covenants for title implied by the Conveyancing Act, 1881, s. 7 (A), in an assignment of leaseholds for valuable consideration, *see p.* 239, *supra*, and Strahan's Convey. Part III. Sect. VI.

(h) **Registered Transfer.**—A new mode of transferring both freehold and leasehold interests has been introduced by the Land Transfer Acts, 1875 and 1897. The Acts apply only to England, and registration under them is still optional save in the County of London, where it has been made compulsory under the powers in that behalf reserved in the Act of 1897.

It is not necessary in an elementary work to go at any length into the details of these Acts, especially as most of them deal with matters of more concern to the officials charged with the administration of them, than to the legal profession generally. A short sketch of their object and of the means by which it is sought to be attained will be sufficient for our purposes.

(a) *Object of Registration.*—Land being parcel of the realm, it is a matter of public importance that its ownership should be known; and further to authenticate ownership as between vendor and vendee, it is necessary to investigate the devolution of the title of the vendor for a considerable period back—forty years being fixed as a rough test of its soundness. Now the object of the Land Transfer Acts was to secure a public record of the ownership of land, and at the same time to facilitate the authentication of ownership as between private persons.

(b) *The Register.*—This object it has been sought to attain by establishing registers of land consisting of three parts:—First, the property register, which gives a description of the land registered with the aid of a filed map: secondly, the proprietorship register, which gives the name and additions of the person who is registered proprietor of the said land: and thirdly, the charges register, which records the incumbrances registered as affecting the land.

There are two of these registers—one for freehold, the other for leasehold land.

(c) *Interests to be registered.*—The interests in land that must be registered are fee simple and leaseholds of not less than forty years' duration. The latter must be derived out of freehold lands, as the Act has no application to copyhold lands or customary freeholds transferable only in the rolls of the manor. And registration is compulsory only on the grant or sale for value of these interests. If registration is not then made, the purchaser obtains only an equitable estate till registration. Once land is registered every subsequent dealing with it should be registered in the same way, in order to prevent its defeat by a subsequent sale by the registered owner. On registration the title deeds are stamped by the registrar, with a note recording the registration, and a copy of the entry in the register is given to the proprietor, which is called a *land certificate*.

(d) *Titles to be registered.*—A proprietor may apply for the registration of his land with either (a) an *absolute* or (b) a *possessory* title. An absolute title is registered only after the registrar has investigated the proprietor's title and has made inquiries by advertisement, &c. as to adverse claims, and is satisfied that the title is without defect. If after such investigation the registrar is satisfied that the proprietor's title is good subject to certain reservations, a title subject to such reservations may be registered. This is called a *qualified* title: no proprietor can apply in the first instance for the registration of a qualified title. The usual—indeed, the only—application in practice is for the registration of a possessory title. This is registered without any investigation of title. All the proprietor need do to secure such registration is to produce to the registrar a conveyance on sale to him, or make a statutory declaration that he is in possession of the land. (Land Transfer Rules, 17—24.) In the same way leaseholds may be registered after an investigation of the lessor's title and declaration of his right to grant the lease (absolute title), or after investigation merely of the lessee's title to the lease (qualified title), or without investigation (possessory title). (Sect. 11, Act of 1875.)

(e) *Effect of Registration.*—The effect of the registration of land in fee simple with an absolute title is to vest the land in the registered proprietor in fee simple absolutely, subject to the incumbrances (if any) set out in the register, and to such liabilities as easements, obligations *ratione tenuræ*, rights to mines or minerals and franchises, unless the contrary is set out in the register (sect. 18, Act of 1875), and subject also to any trusts affecting the land in the hands of the registered proprietor. (Sect. 7.) A qualified title gives the same estate, subject to the reservations which qualify it. In the same way the first registered proprietor of a leasehold, with a declaration of the lessor's right to grant the lease, has vested in him the possession of the land for all the leasehold estate therein described, subject to the provisions of the lease, to registered incumbrances, to obligations, such as easements, &c., and to trusts. (Sect. 13.)

(f) *Who may Register.*—The only person entitled to apply for registration is the person entitled to the possession of the land. Such person, however, is not always the owner of the whole interest in the fee simple or in the leasehold he desires to register. Accordingly, it is provided that in the case of settled land the tenant for life or the trustees of the settlement may be registered as owners of the whole estate settled, and that a mortgagee whose power of sale over the fee simple or leasehold, as the case may be, has actually arisen may be registered as owner of the estate mortgaged.

(g) *Cautions, Restrictions, and Inhibitions.*—To prevent persons registered as owners, but having merely a limited interest or having merely the legal estate in the land registered, selling the whole estate to *bonâ fide* purchasers without notice, a system of checks by notes entered in the proprietorship register has been established. These checks are of three kinds. *Cautions*, which merely amount to notes that the registrar shall communicate with the person entering the caution before registering any dealings with the registered property. This is chiefly for the benefit of *cestuis que trust* and other persons having equitable interests in the land. As trusts are not registered the trustee of registered land might, as we shall see, sell the settled estate discharged from the trust to a *bonâ fide* purchaser for value. The caution, by giving the *cestuis que trust* an opportunity of giving the intended purchaser, before registration of the sale to him, notice of the trust, prevents this. *Inhibition*, which is a note that no entry shall be made in the register until further order. This can only be put in the register with the consent of the proprietor or by order of the registrar or Court. Its most frequent use would be in case of the proprietor being a married woman without power of anticipation, or being a tenant for life where there are no trustees of the settlement. *Restrictions*, which are notes prohibiting transfers in the register without the consent, or unless the purchase-money is previously paid to certain persons. These are useful where the registered proprietors are trustees of the settlement, and not entitled to sell without the consent of the life tenant, or the registered proprietor is life tenant under a settlement, and so on a sale is not entitled to receive the purchase-money.

(h) *Title obtained by Purchaser from Registered Owner.*—Where there are no cautions, inhibitions or restrictions noted in the proprietorship register, the registered proprietor is entitled to sell the registered land for the estate registered, and the purchaser on the sale itself being registered receives a good title thereto, subject (where the registered title is absolute) to registered incumbrances and rights, such as easements, &c., which do not need registration, and, where the registered title is possessory, to these, and also to all rights which existed prior to registration. Any other rights or claims which would have been good against the vendor are defeated, but if they were defeated through a fraudulent or mistaken entry in the register, their owners are compensated at the public expense, unless the mistake or fraud was partly or wholly due to their neglect or default. (*See Attorney-General* v. *Odell*, (1906) 2 Ch. 47.) If the sale by the registered owner is not itself registered, the purchaser still obtains the legal and equitable estate in the land. This estate, however, may be defeated by the registered owner reselling to another purchaser without notice of the first sale, if such second purchaser registers the sale to him first. (*Capital and Counties Bank* v. *Rhodes*, (1903) 1 Ch. 631.)

(i) *Mortgages of Registered Land.*—Finally, mortgages are made by way of registered charges. A mortgage by deed creates only an equitable mortgage until the charge is registered as an incumbrance. Even then it seems to create only an equitable charge as against equitable incumbrances created before the land was registered, and, accordingly, is postponed to them. This arises from the fact that a registered charge does not transfer the legal estate to the mortgagee. To make the mortgage a legal mortgage the mortgagee should be entered, not as an incumbrancer on the registered land, but as transferee of it, and the terms of the mortgage should be recorded in a collateral deed. An equitable mortgage by deposit can be effected by deposit of the land certificate, but to make it any sort of a security the equitable mortgagee should at once notify the registrar by registered letter of the transaction.

(j) *Evidence of Title.*—One great object of the Land Transfer Acts was to abolish as far as possible the necessity for investigation of title on the sale of land. It is intended that ultimately a purchaser by a simple inspection of the register will be enabled at once to see what title his vendor has. How this is to be accomplished is best seen by sect. 16 of the Act of 1897:—

"(1.) A purchaser of registered land shall not require any evidence of title, except—

(i.) the evidence to be obtained from an inspection of the register, or of a certified copy of, or extract from, the register;

(ii.) a statutory declaration as to the existence or otherwise of matters which are declared by section eighteen of the principal Act and by this Act not to be incumbrances;

(iii.) if the proprietor of the land is registered with an absolute title, and there are incumbrances entered on the register as subsisting at the first registration of the land, either evidence of the title to those incumbrances, or evidence of their discharge from the register;

(iv.) where the proprietor of the land is registered with a qualified title, the same evidence as above provided in the case of absolute title, and such evidence as to any estate, right, or interest excluded from the effect of the registration as a purchaser would be entitled to if the land were unregistered;

(v.) If the land is registered with a possessory title, such evidence of the title subsisting or capable of arising at the first registration of the land as the purchaser would be entitled to if the land were unregistered.

"(2.) Where the vendor of registered land is not himself registered as proprietor of the land or of a charge giving a power of sale over the land, he shall, at the request of the purchaser and at his own expense, and notwithstanding any stipulation to the contrary, either procure the registration of himself as proprietor of the land or of the charge, as the case may be, or procure a transfer from the registered proprietor to the purchaser.

"(3.) In the absence of special stipulation, a vendor of land registered with an absolute title shall not be required to enter into any covenant for title, and a vendor of land registered with a possessory or qualified title shall only be required to covenant against estates and interests excluded from the effect of registration, and the implied covenants under section seven of the Conveyancing and Law of Property Act, 1881, shall be construed accordingly."

Where the registration was voluntary, the registered proprietor may at any time have the land removed from the registry on the delivery up of the land certificate, or office copy of the lease, and thereupon no further entries will be made in the register. (Sect. 17, Act of 1897.)

The Land Transfer Acts apply only to England (sect. 2 of Act of 1875); but there are in force in Ireland other statutes following the same lines. An abstract of these is contained in Appendix D.[1]

II. *Alienation of Goods.*

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Title to Goods.—The rule of the common law that no one can give a better title to a thing than he himself possesses, applies to alienations of goods as well as to alienations of land. (Sale of Goods Act, 1893, s. 21 (1).) But in the case of goods there are considerable exceptions to it. The most important of these are as follows:—

(a) *Sales in Market Overt.*—In the City of London every shop in which goods are publicly exhibited for sale is market overt on every week day for the sale of such goods as the shopkeeper openly professes to deal in, though not for the purchase of such goods when the purchaser is the shopkeeper. (*Hargreave* v. *Spink*, (1892) 1 Q. B. 25.) Out of the City of London, market overt is the public market held on certain days by charter or prescription. (*Case of Market Overt*, 5 Rep. 83 b.) It is provided by the Sale of Goods Act, 1893, s. 22 (*see p.* 264, *infra*), that a buyer of goods in market overt, buying them in good faith and without notice that the seller's title is defective, acquires a good title to the goods sold. This, however, does not affect the law as to the sale of horses, which is subject to special statutory provisions. (2 & 3 Ph. & M. c. 7; 31 Eliz. c. 12.)[1] Even though the goods in question have been stolen, the property passes in the first instance to the innocent purchaser, but subject to this condition, that if the thief is prosecuted to conviction, the property re-vests in the owner or his personal representatives, notwithstanding the intermediate dealings, whether by sale in market overt or otherwise. Where goods are held by a seller by a voidable title, as, for instance, when he has obtained them from the true owner by fraud or other wrongful means, if they are sold to a *bonâ fide* purchaser without notice before the voidable title is made void, even though the sale was not in market overt, the purchaser will take a good title, and the property in the goods will not re-vest in the true owner merely by reason of the conviction of the seller. (Sects. 23, 24; *see* *Cundy* v. *Lindsay*, 3 App. Cas. 459.)

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[1] For a more elaborate discussion of assurance by registration, *see* Strahan's Conveyancing, Part VII.

(b) *Dispositions of Goods by Mercantile Agents.*—Under the Factors Act, 1889, dispositions of goods made by such agents in the ordinary course of business to persons dealing with them in good faith and without notice of the agent's want of authority to dispose of the goods, give a good title to such innocent disponees.

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[1] It seems doubtful whether a modern market, established under the provisions of an Act of Parliament, is or is not market overt. In Ireland the Queen's Bench Division have held that it is (*Ganly* v. *Ledwidge*, I. R. 10 C. L. 33); in England, Cockburn, C.J., held, that a market established under a local Act is not market overt. (*Moyce* v. *Newington*, 4 Q. B. D. 34.)

(c) *Sale by Seller in Possession after Sale.*—If a vendor is left in possession of the goods, or documents of title to them, a sale by him to a *bonâ fide* purchaser without notice gives the latter a good title, though it may be a fraud on the first purchaser. (Sale of Goods Act, 1893, s. 25 (1).) An unpaid vendor has a right to resell the goods. (*Idem*, sect. 48.)

(d) *Sale by Buyer in Possession of Goods.*—Where a vendee has agreed to buy goods, and, by the consent of the owner, he has obtained possession of them, or of the documents of title to them, a sale by him to a *bonâ fide* purchaser without notice gives the purchaser a good title, though it may be in fraud of the original vendor. (Sale of Goods Act, 1893, s. 25 (2); *Cahn & Mayer* v. *Pockett's Bristol Channel Steam Packet Co.*, (1899) 1 Q. B. 643.)

(e) *Delivery of Current Coin.*—"Money cannot be recovered after it has passed in currency; in the case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and *bonâ fide* consideration." (*Per* Lord Mansfield, *Miller* v. *Race*, 1 Burr. 452; 1 Sm. L. C.)

(f) *Estoppel.*—The vendee may also have by estoppel against the true owner a better title than the vendor had, where the owner is by his conduct precluded from denying the seller's authority to sell. (Sale of Goods Act, 1893, s. 21.)

Modes of Alienation of Goods.—Chattels, or *choses in possession*, are assignable by the act of the owner *inter vivos* in four ways: (a) by *gift and delivery;* (b) by *deed of gift;* (c) by *sale;* (d) by *indorsement and delivery of bill of lading.*

(a) **Gift and Delivery.**—Where the owner of a chattel gives it to another, declaring by words or by writing not under seal his intention to transfer the ownership, and also transfers the possession of the chattel, or of the indicia of title to it (*Rawlinson* v. *Mort* (1905), 93 L. T. 555), there is a complete gift, and the chattel becomes the property of the donee. There has been considerable doubt as to whether actual delivery is indispensable to a gift. It has now been decided that delivery is necessary to all gifts not made by deed. (*Cochrane* v. *Moore*, 25 Q. B. D. 57; following *Irons* v. *Smallpiece*, 2 B. & A. 551.) "In ordinary English language," it is there said, "and in legal effect, there cannot be a 'gift' without a giving and taking." (*Per* Lord Esher, M. R., 25 Q. B. D. 76.) Delivery consists in the voluntary transfer of possession from one person to another; that is, "the deliveror, by some apt and manifest act, puts the deliveree in the same position of control over the thing, either directly or through a custodian, which he held himself immediately before that act." (P. & W. on Possession, p. 46.)

Where, however, the thing was in the possession of the donee before the gift was made, to make the gift effective it is not necessary that the thing should be restored to the owner and re-delivered by him to the donee. A change in the character in which the thing is held is sufficient to support the gift. (*Kilpin* v. *Ratley*, (1892) 1 Q. B. 582.)

(b) **Deed of Gift.**—A gift of chattels may also be made by deed, and in this case the property in the chattel vests in the donee upon the execution of the deed, whether the possession has been transferred or not, unless and until he repudiates the gift; and acceptance is presumed until dissent is signified. Delivery is not necessary because a deed imports a valuable consideration, and, therefore, the donee under a deed of gift, if the thing given is afterwards refused him, can as a purchaser sue and recover it.

It is to be remembered that a gift, whether by parol or by deed, may be made subject to any conditions which the donor pleases to put upon it, and is then incomplete until the donee fulfils such conditions. And so long as a gift is incomplete, whether by reason of some condition remaining to be fulfilled or of the property not having been completely transferred, it may be revoked by the donor; or, in other words, there is a *locus pœnitentiæ* while a gift is incomplete. An example of a gift made subject to an implied condition occurs in the case of presents made by a man to a lady to whom he is betrothed; the condition here is that if the engagement is broken off by the lady, the presents shall be returned. (*Robinson* v. *Cumming*, 2 Atk. 409.) But the most important class of conditional gifts consists of *donationes mortis causâ*, where the implied condition is that the gift is to take effect only in the event of the donor's death. These will be treated of in the next section, along with wills.

(c) **Sale.**—By far the most important mode of alienation of goods *inter vivos* is by sale—a contract in which the seller transfers, or agrees to transfer, the property in goods to the buyer for a money consideration called the price. (Sale of Goods Act, 1893, s. 1.) Its two characteristic elements are: that the property in the thing sold passes to the buyer at such time as the parties to the contract intend it to pass, although the possession may not then have been transferred; and second, that this transfer of property is made in return for a money consideration. If any other consideration than money be given, the transaction is not a sale, but a special contract for the transfer of property. The law as to the sale of goods has now been consolidated in the Sale of Goods Act, 1893, which we will proceed to consider.

The general rule as to the form of the contract of sale is, that no special form is required: it may be verbal, in writing, or implied from the conduct of the parties.

(Sect. 3.) To this, however, there are two important exceptions:—

(1.) The transfer of a British ship must be made by bill of sale, in the form provided by the Merchant Shipping Act, 1894, and executed, witnessed, and registered as that Act requires. (Sects. 24—26.)

(2.) An exception so wide as almost to swallow up the rule is that introduced by the 17th section of the Statute of Frauds, 1677, which was further defined by Lord Tenterden's Act, 1828.

The provisions on this point of both the Statute of Frauds and Lord Tenterden's Act are now embodied in the Sale of Goods Act, s. 4, which provides that a contract of sale of any goods of the value of 10*l*. or upward shall not be enforceable by action unless the buyer accept part of the goods and actually receive them, or give something in earnest to bind the contract or in part payment (*see Norton* v. *Davison*, (1899) 1 Q. B. 401), or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf. This applies although the goods are intended to be delivered at a future time, or are not actually made or procured or provided at the time of the contract. (Sect. 4 (2).) The *acceptance* referred to is defined as any act of the buyer in relation to the goods recognizing a pre-existing contract of sale. (Sect. 4 (3); *Abbott & Co.* v. *Wolsey*, (1895) 2 Q. B. 97.) The memorandum must set out the names or sufficient description of the buyer and seller, the goods sold, the price, if agreed on, and all other material terms in the contract. (See *Cox* v. *Hoare* (1907), 96 L. T. 719.)

Implied Conditions and Warranties.—There are certain conditions and warranties implied in a contract for the sale of goods analogous to the covenants for title implied in a sale of land. In every such sale there are implied a condition of the seller's right to sell, and warranties of quiet possession of the goods sold and of their freedom from any undisclosed incumbrance. (Sect. 12.) Where the sale was made by means of a description or sample, a condition is implied that the goods shall correspond to the description or sample. (Sects. 13, 15.) As to quality, conditions are implied in two cases: (a) where the seller sold the goods for a particular purpose, and the buyer has made it clear that he relied on the seller's judgment as to their fitness for the purpose, there is an implied condition that the goods shall be reasonably fit for that purpose; (b) where the buyer bought by description from a seller who deals in the goods sold, there is an implied condition that the goods shall be of merchantable quality. (Sect. 14.)

A breach of condition entitles the buyer to repudiate the contract of sale; a breach of warranty merely gives him a claim for damages; but the buyer, if he pleases, may elect to treat a breach of condition as a breach of warranty, and sue on it for damages without repudiating the contract, and the buyer must so treat the breach if he has accepted part of the goods sold under an entire contract or, in the case of a sale of specific goods, when the property has passed to him. (Sect. 11.)

When the Property passes.—The sale transfers the property in the goods sold at such time as the parties intend it to be transferred. For ascertaining this intention, it is provided in general terms that regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case. (Sect. 17.) But the accurate ascertainment of this time is of great importance, since *primâ facie* "the risk passes with the property," that is, in the event of the goods being destroyed, the loss falls upon the person whose property they then are. (Sect. 20.) Accordingly, the Act lays down a number of rules by which, in the absence of a contrary intention, the time when the property passes is to be fixed: when specific goods are sold in a deliverable state, the property passes when the contract is made; when any act remains to be done by the seller to make the goods deliverable, or when the seller has to weigh, measure, or test the goods in order to ascertain the price, the property does not pass till such acts are done and the buyer has notice thereof; if the goods are sent "on approval," the property passes when the buyer does any act adopting the transaction (*Kirkham* v. *Attenborough*, (1897) 1 Q. B. 201), or retains the goods for more than a reasonable time without signifying his rejection; and finally, when unascertained or "future" goods are sold by description, the property passes when such goods are unconditionally appropriated to the contract by either seller or buyer with the other's assent. The commonest mode of "unconditional appropriation" is the seller's delivering the goods to a carrier for transmission to the buyer, reserving no right of disposition.

Position of the Parties.—(1.) *Of the Seller.*—It is the seller's duty to deliver the goods, as it is the buyer's to pay for them (sect. 27); and these, unless otherwise agreed, are concurrent conditions, that is, the seller must be ready and willing to give possession of the goods to the buyer in return for the price, and *vice versâ*. (Sect. 28.) An unpaid seller has various rights with regard to the goods. First, he has what is called a vendor's lien over them; that is, he may retain possession of the goods until he is paid.[1]

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[1] The Court of Appeal has lately decided that the doctrine of vendor's lien, which has long been applied on sales of realty, applies equally on sales of personalty, *i.e.*, that the lien continues after the property sold has been parted with, unless there was a contrary intention, and binds it in the hands not merely of the original purchaser, but of purchasers for value from him with notice of the lien. Further, as the Statutes of Limitation do not apply to charges on personalty, the vendor can at any distance of time apply to the Court to have his lien enforced. (*In re Stucley, Stucley* v. *Kekewich,* (1906) 1 Ch. 67.) Of course, in ordinary sales of goods this doctrine would not apply, since there is usually an intention of parting with all interest in the goods sold and relying on the purchaser's general credit.

Second, if he is still retaining possession, and payment is delayed for an unreasonably long time, he may re-sell. Third, if, when the goods have left his possession, and are on their way to the buyer, he discovers that the buyer is insolvent, he has a right of stoppage *in transitu* (sects. 39 and 44), that is, he may resume possession of the goods (either by actually taking possession, or by giving the carrier notice of his claim) and hold them till payment or tender of the price. (Sect. 46.) If the goods have come into the buyer's possession, and he wrongfully neglects or refuses to pay, the seller has a right of action against him for the price (sect. 49); if the buyer wrongfully neglects or refuses to accept the goods, he may be sued for damages for non-acceptance. (Sect. 50.)

(2.) *Of the Buyer.*—The buyer has a right to have the goods delivered to him according to the terms of the contract, and if the seller wrongfully neglects or refuses to do so, the buyer has a right of action for damages for non-delivery. (Sect. 51.) If the property in the goods has passed by the contract, the buyer can also sue in trover, or for specific performance. (Sect. 52.) In the absence of a contrary agreement, the place of delivery is the seller's place of business or residence, unless the goods are specific and are known to the parties to be elsewhere, when the place where the goods are is the place of delivery. (Sect. 29.)

(d) **Bills of Lading.**—A bill of lading is a receipt for goods shipped, given by the shipmaster as agent for the owners of the ship to the owner of the goods or his agent, coupled with an undertaking to deliver the goods in question to the shipper, a consignee, or their assigns. Since it is obviously for the convenience of commerce that the goods should be capable of being dealt with while still on the voyage, it is a rule of the law merchant that the property in the goods may be transferred by indorsement and delivery of the bill of lading. The shipowner is, therefore, bound to deliver the goods to the assignee who presents the bill of lading. And by the Bills of Lading Act, 1855, the transfer of the bill of lading operates also as an assignment of the contract contained in it, so that the transferee can sue on that contract in his own name, and is liable upon it exactly as if he had been originally a party to it.

Part B. *Alienations mortis causâ.*

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Alienations mortis causâ.—Alienations *mortis causâ* are transfers of interests in things made in view of the transferor's death, and in their nature revocable by the transferor at his will and pleasure at any time before his death. They are divided according as the alienation is to take effect immediately, or is not to take effect until the death of the alienor. In the first case, the transfer is called alienation by *donatio mortis causâ;* in the latter, alienation *by will or testament*. The latter is incomparably the more important.

I. *Donationes Mortis Causâ.*

Donationes mortis causâ.—As has been said, a *donatio mortis causâ* is a gift made by a man in expectation of speedy dissolution, but intended to operate as a gift, not from such dissolution, but immediately. (*Solicitor to the Treasury* v. *Lewis*, (1900) 2 Ch. 812.) The gift is subject to two conditions arising out of its nature: firstly, that should the donor recover—that is, should the expected dissolution not then take place—the gift is *ipso facto* void; and secondly, that the donor in any event may expressly revoke the gift at any time before his death. He cannot, however, revoke it by his will.

The gift must be evidenced by delivery either of the thing given or of the means of obtaining it—such, for instance, as the keys of the box in which it is contained. (*See In re Wasserberg*, (1915) 1 Ch. 195.) The delivery must be made by the donor himself, or by some other person in his presence, and by his direction: and it must be made to the donee or an agent of his. As in the case of gifts *inter vivos*, if the chattel is already in the possession of the donee, no re-delivery to him is necessary. (*Cain* v. *Moon*, (1896) 2 Q. B. 283.) Originally, only things the ownership in which passed by delivery without further act on the donor's part could pass under a *donatio mortis causâ*, but now certain other things may be so given, such as mortgaged securities, bills of exchange payable to order and not indorsed, policies of assurance, post office orders (*Veal* v. *Veal*, 27 Beav. 303; *Beddington* v. *Bauman*, (1903) A. C. 13, at p. 19), and cheques payable to the donor but not the donor's own cheques or promissory notes payable to the donee. (*In re Leaper*, (1916) 1 Ch. 579.) These, however, may be regarded, perhaps, rather as cases of the delivery of the means of obtaining the things given than as cases of the delivery of the thing itself. (*In re Mead, Austin* v. *Mead*, 15 Ch. D. 651.)

A *donatio mortis causâ* may be impressed with a contion binding upon the donee if such condition was attached to it at the time delivery was made by the donor. The most common condition is one that the donee shall pay for the donor's funeral. (*Hills* v. *Hills*, 8 M. & M. 401.)

Donationes mortis causâ are subject to the same death duties as gifts under wills. Like these, too, they are liable, on a deficiency of assets, to the donor's debts. They are not, however, liable for the executors' costs in an action concerning the will. (*Kelly* v. *O'Connor*, (1917) 1 Ir. R. 312.) And even at common law they could always be made to the donor's wife.

II. *Alienation by Will.*

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Description of a Will.—A *will* or *testament* is a conveyance intended to come into operation on the death, and only on the death, of the grantor. Until that event it has no effect whatever, and until that event the grantor is entitled to alter or revoke it at his will and pleasure. This is what is meant by the phrase that a will is *ambulatory till death*.

A *codicil* is an addition to a will (*codex*, will; *codicillus*, little will) executed subsequently to the will itself and with the same formalities as a will. It is considered part of the will to which it is attached, or, as is usually said, it is to be read with the will. In so far, and only in so far, as its terms are inconsistent with the will, it revokes or overrules the will. (*Morley* v. *Rennoldson*, (1895) 1 Ch. 449; *and see In re Segelcke, Ziegler* v. *Nicol*, (1906) 2 Ch. 301.)

The person who makes a will is called the *testator*, if a man; *testatrix*, if a woman. A gift under a will is called a *devise* if the gift is of realty; a *legacy* or *bequest* if the gift is of personalty. The person taking such a gift is called a *devisee* if the gift is of realty, a *legatee* if the gift is of personalty, and in either case a *beneficiary*. If persons are appointed by the will to carry out the wishes of the testator as to the disposal of his estate, they are called the *executors* of the will; if persons are not appointed by the will to carry out the testator's wishes, then, should the property disposed of by the will include personalty, and in the case of testators dying on or after the 1st of January, 1898, whether it include personalty or not (Land Transfer Act, 1897, s. 1 (1), (3)), the Court will appoint such persons, and they will in that case be called *administrators with the will annexed*. (*See infra, p*. 294.)

It is to be remembered that under the Public Trustee Act, 1906, the Public Trustee is empowered to act as executor or administrator, to apply for probate or letters of administration, and to take over the administration of small estates.

History of Wills.—As these terms sufficiently indicate, the idea of a will or testament is of Roman origin. It seems to have been unknown to the ancient common law of England. Originally, on the death of the owner of land or goods, the land or goods devolved on the deceased owner's surviving relatives according to the rules of descent and succession unaffected by any act or desire on his part. Testamentary power was first established with regard to goods—indeed, strictly speaking, a testament still means a will dealing only with personalty,—and it was established chiefly through the influence and learning of Churchmen, whose study of the civil law made them well acquainted with the conception of a will. At first the power only applied to a portion of the testator's personalty. As enacted by the Magna Charta of 1225 A.D. (9 Hen. III. c. 18), on the death of a tenant any debt due to the king was to be first paid out of the deceased's goods and chattels, "and the residue shall remain to the executors to perform the testament of the dead; and if nothing be owing unto us, all the chattels shall go to the use of the dead; saving to his wife and children their reasonable parts." The reasonable parts of the wife and children consisted of one-third part each of all the personalty, and it was only as to the remaining third that the deceased's will operated. Gradually, however, its operation was extended to all the testator's personalty, including, of course, his chattels real. In some places, however, the old law survived as a special custom, and as to these in later times the special custom was abolished by statute. (*See* 2 Bl. Com. 493.) And now, by sect. 3 of the Wills Act, 1837, testamentary power has been extended to all the personal estate which the testator at his decease shall be entitled to either at law or in equity.

The history of testamentary power over freehold lands is somewhat different. Here, again, its introduction was due to the influence and learning of ecclesiastics.[1] As has already been pointed out, feoffments to the use of the feoffor's will were protected and enforced by the early clerical chancellors, no doubt largely in the interests of the Church. Such feoffments were put an end to by the Statute of Uses. Testamentary power was, however, very shortly afterwards re-established over fee simple land by the Statutes of Wills, 1540, 1542. By these statutes a holder of such lands by tenure of knight-service was entitled to devise two-thirds of them, while a holder in socage could devise them all. (Co. Litt. 111 b.) By the Military Tenures Act, 1662, tenure in socage became universal, and with it testamentary power over fee simple lands became universal too. As to estates *pur autre vie*, the only other kind of freehold estates that, strictly speaking, may survive their owner, these were made subject to the tenant's last will by sect. 12 of the Statute of Frauds, 1677. This section, and also the Statutes of Wills, have been repealed by sect. 2 of the Wills Act, 1837; but by sect. 3 of the same statute it is enacted that every person not under disability is entitled to devise all real estate to which he shall be entitled at the time of his death, and real estate is to include any estate, right, or interest, other than a chattel interest in any hereditaments, and "all rights of entry for conditions broken, or other rights of entry." This provision renders devisable a possibility of reverter on a conditional fee simple where conditional fees may still subsist, as they may in copyholds. (*Pemberton* v. *Barnes*, (1899) 1 Ch. 544. *See* Strahan's Wills, pp. 1—14.)

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[1] From very early times customs to devise have been legally recognized as obtaining in certain places. How these arose it is now very difficult to say. For a history of the growth of the right to devise, *see* Co. Litt. 111 b, note.

Effect of History.—Wills of goods, then, and wills of freehold land were both introduced by the influence of the Church. In the case of wills of goods, however, the influence of the Church continued to mould the law until quite recent times; while in the case of wills of freehold the influence of the Church ended with the introduction of statutory testamentary power: after that, the law relating to them was moulded by express enactment, and by the policy of the ordinary Courts of law. This difference in the history of wills of personalty and wills of realty led to considerable differences in the law with regard to these. These differences concerned chiefly two points: the execution of wills, and the operation of wills after the death of the testator. Most of the differences on the former point, and some of those on the latter point were swept away by the Wills Act, 1837; and now, by the Land Transfer Act, 1897, the remainder have, as far as England is concerned, for the future disappeared. The latter Act, however, does not apply to Ireland at all, and in England it applies only in the case of testators dying on or after 1st January, 1898. The old law, then, is still of great importance in both countries.

Wills of Realty and of Personalty.—The primary difference, then, which has hitherto characterized the operation of wills of realty and wills of personalty is this. A will of realty has been in almost every way simply an ordinary conveyance of land from the testator to the devisee to take effect from the death of the testator. A will of personalty has been not an ordinary gift of goods by deed or other writing, but resembles a form of universal succession as existing under the civil law.

This difference shows itself most markedly in two respects: (a) in the way in which the law regarded the will itself; and (b) in the effect of the will in transmitting the ownership of the property included under it.

(a) In the case of a will of realty, the law formerly regarded the will simply as a conveyance between two private persons, with which it had nothing more to do than with any other such conveyance. It supplied no means by which the validity of the will might be once for all established, and it insisted on no further registration or record being kept of it than of any other conveyance affecting the land in question.

In the case of a will of personalty, on the other hand, the law always regarded the will as a public instrument. It insisted that the will should be handed over to its custody, and that before doing so it should be satisfied that the instrument was a validly-executed will. Where there was no contest as to the will's validity, this proof was merely formal—usually the oath of the executor being sufficient. It was then called proof in *common form*. If, however, there was a contest, or a threatened contest, as to the validity of the will, then the person producing or, as the phrase is, propounding the will, was entitled to prove it by a regular action in which the person propounding the will—the executor usually—and the person or persons contesting it, each produced their witnesses, and cross-examined those produced by the other side. Proof by action was called *proof in solemn form per testes*. The chief difference between the two forms of proof is this: proof in solemn form finally established the validity of the will, while proof in common form had no such effect. For an indefinite time after the latter the executor might be called upon by anyone interested to prove the will in solemn form.

Wills including under them only freehold land could not be admitted to proof either in solemn or common form. (*In the Goods of Jane Barden*, L. R. 1 P. & M. 325.) But wills including under them both freehold land and personalty could be so admitted, and such wills were, by proof in solemn form, established finally both as to personalty and the freehold land included under them.

In England this difference in the operation of wills of realty and wills of personalty has been abolished as to the wills of persons dying on or after the 1st January, 1898. The law as here stated with regard to wills of personalty then became applicable to wills of realty. Probate is granted to wills including under them nothing but real estate (Land Transfer Act, 1897, s. 1 (3)), and freeholds generally rank as far as probate is concerned like chattels real. (Land Transfer Act, 1897, s. 2 (2).)

Formerly the Ecclesiastical Courts had jurisdiction over probate of wills and also over their custody. In 1857 this jurisdiction was taken from them by the Court of Probate Act and vested in the Court of Probate established under that Act. By the Supreme Court of Judicature Act, 1873, s. 16, the jurisdiction of the Court of Probate is now vested in the High Court of Justice.[1] Under sect. 10 of the Court of Probate Act, 1857, the County Court has jurisdiction as to probates of wills where the testator at the time of his decease lived within the district of the County Court in question, and where his estate, exclusive of that held by him as trustee, does not exceed 200*l*. personalty and 300*l*. realty.

By the Probates (Ireland) Act, 1857, probates granted in Ireland, and by the Confirmation of Executors (Scotland) Act, 1858, confirmations granted in Scotland, are, on production in the Probate Court in England, to be resealed, and to have the effect of probates granted in England, and English probates are to be similarly treated in Ireland and Scotland; and by the Colonial Probates Act, 1892, the King may extend by Order in Council the same privilege to probates granted in any British possession on being satisfied that adequate provision has been made for the recognition in such possession of probates granted in the United Kingdom. Such Orders in Council have now been made in respect of nearly all British colonies. (*See* Strahan's Wills, p. 73.)

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[1] In England such jurisdiction is exercised by a separate Division of the High Court; in Ireland by a branch of the King's Bench Division called the "King's Bench Division (Probate)."

(b) A will of realty before the Land Transfer Act, 1897, immediately on its coming into operation, vested in the devisees under it the land devised in it to them. These devisees might, if they liked, disclaim the land; but until they did so they were regarded by law as the owners of it. In these respects a will was like any other conveyance operating by grant. And be it noted that this rule applied as well to devises in wills referring both to realty and personalty as to devises in wills of pure realty only. Freehold land left by will, immediately on the death of the testator vested in the devisee.

In the case of a will of personalty, however, the first effect of the will always was to vest the whole personalty, to whomsoever it might be bequeathed, in the executor. (Co. Litt. 388 a.) However specifically an article might be bequeathed to any person, on the death of the testator the ownership of the article vested in the executor, and the legatee had no property in it till the executor had assented to the legacy. And the executor was under no obligation to give his assent until a year after the testator's death. This period—called *the executor's year*—the law allowed to executors to enable them to ascertain and pay off the debts of the testator and generally to administer his estate.

So necessary was the office of executor to a will of personalty, that formerly such wills were void if no executor were appointed by them. This is no longer the case. On the other hand, an executor was unnecessary to a will of realty only; indeed, the office, strictly speaking, could not exist under such a will. An executor, as such, had nothing to do with a testator's realty, and if any of it was actually devised to him—as, for instance, for the purpose of paying the testator's debts—he took it not as executor but rather as trustee.

In England this difference in the operation of wills of realty and wills of personalty has been abolished as to the wills of persons dying on or after 1st January, 1898. The law as here stated with regard to wills of personalty has now become applicable to wills of realty. Freeholds, however devised, now, immediately on the death of the testator, vest in the executor (Land Transfer Act, 1897, s. 1 (1)), who is a trustee of them, subject to the testator's debts, for the devisee, or, if they be not devised by the will, for the testator's heir. (*Ibid.*, sect. 2 (1).) And where they are devised the executor can transfer them to the devisee by assenting to such transfer (*Ibid.*, sect. 3), just as if they were chattels real or specific legacies. (*See infra*, *p.* 291.)

Execution of Wills.—It has already been pointed out that the formalities necessary to the valid execution of a will varied greatly under the old law according as the will dealt with personalty only, or with realty. This, however, has been altered by the Wills Act, 1837, which makes it necessary and sufficient to the validity of every will that certain formalities should be observed in its execution. These are:—

(a) The will must be reduced into writing before execution. (Sect. 9.) Originally wills of personalty could be made by word of mouth merely; they were then called *nuncupative* wills. This rule was practically abolished by the Statute of Frauds, save as regards wills of soldiers when engaged upon an expedition, and wills of sailors at sea. This exception is preserved by the Wills Act. (Sect. 11.) But, by subsequent legislation, the wills of petty officers and seamen in the royal navy, and of seamen in the merchant service, as far in both cases as wages, pay, &c. are concerned, are subjected to certain provisions for the prevention of frauds on such persons' relatives. (*See* Navy and Marines (Wills) Acts, 1865 and 1897, and Merchant Shipping Act, 1894, s. 177.)

Though the whole will must be reduced into writing before execution, yet it need not be all written on the same piece of paper, or on pieces of paper physically connected. Other documents proved to be actually existing at the time of execution may be incorporated in the will by a sufficient description of them in the will itself. Thus, a bequest to "the persons named and upon the trusts set out in a deed of trust executed by me on 1st January, 1895, and now deposited at my solicitors'," would, if it were proved that a trust deed answering this description was actually existing, and in the hands of the solicitors at the time the will was executed, make that trust deed a part of the will. (*See University College of North Wales and University of Wales* v. *Taylor* (1908), L. J. P. 20.) No subsequent writing, however, adding to or altering the will as executed can affect the will, save it is executed with the forms of a new will. (Sect. 21.) Accordingly, where alterations or interlineations have been made in the will before execution, it is customary on execution to mark them with the initials of the testator and witnesses to prevent any question subsequently arising as to whether they were made before or after execution. (*In the Goods of Streatley*, (1891) P. 172.)

(b) It must be signed by the testator, or by some other person in his presence and by his direction, and such signature must be made or acknowledged by him in the presence of two witnesses present at the same time. Such signature is to be at the foot or end of the will (sect. 9, Wills Act), and so placed as to show on the face of the will that the testator intended to give effect by such signature to the will. (15 Vict. c. 24, s. 1.) If the signature is not at the foot or end of the will, the part following it will be invalid. (*In the Goods of Anstie*, (1893) P. 283.)

(c) The two witnesses must attest the will in the presence of the testator and in the presence of each other (sect. 9; *Wyatt* v. *Berry*, (1893) P. 5); but it is not necessary (though it is highly desirable) that they should subscribe their names to the will in each other's presence. (*In the Goods of Webb*, Deane's Ecc. C. 1.)

Formerly no witnesses were necessary in the case of a will of personalty when such will was in writing, while at least three witnesses were required to a will of realty. Moreover, such witnesses had to be credible witnesses—that is, not infamous persons, or persons who themselves, or whose husbands or wives, received gifts under the will. Section 14 of the Wills Act, 1837 (re-enacting and amending 25 Geo. II. c. 6), now enacts that the incompetency of a witness shall not invalidate a will; and by the following section, where a witness, or the wife or husband of a witness, is a beneficiary under the will, the gift is to be void and the attestation good. This latter provision, however, does not render void a gift to a creditor who is a witness to the will merely in payment of testator's debt to him; and an executor is a good witness to the execution of a will, and also to its validity or invalidity. (Sect. 17.)

No attestation clause is necessary, but it is usual to add one, as its presence facilitates probate of the will. Where such clause is present, the oath of the executors that they believe the will to be the last true will of the deceased is sufficient proof to obtain probate; but where it is absent, an affidavit as to its execution from one or both of the witnesses, or, if they are dead or not to be found, from someone acquainted with the testator's handwriting will be required in addition to the oath of the executor. (*In the Goods of Stephen Sweet*, (1891) P. 400. *And see* generally Strahan's Wills, pp. 43—51.)

Domicile and Execution.—With regard to wills of freehold land, the law has always been that they are to be executed in accordance with the law of the place where the land is—the *lex situs*, as the phrase is. (*Freke* v. *Carbery*, L. R. 16 Eq. 461.) With regard to wills of goods, on the other hand, the law formerly was that they were to be executed in accordance with the law of the place where the testator was permanently resident—his domicile, as it is called—at the time of his decease (as to a wife's domicile, *see In re Mackenzie*, (1911) 1 Ch. 578). Now, frequently it is extremely difficult to determine where a given person is domiciled, and, to prevent the validity of wills depending on the solution of so dubious a question, an Act, known as Lord Kingsdown's Act, was passed in 1861 enacting that in the case of wills of personalty made out of the United Kingdom by a British subject, whatever may be such person's domicile, his will is to be well executed for the purpose of probate if it is made according to the forms required either by the law of the place where it was made, or by the law of the place where such person was domiciled when it was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin (sect. 1); and in the case of wills of personalty made within the United Kingdom by a British subject, whatever may be such person's domicile, the will is to be well executed for the purpose of probate if it be executed according to the forms required by the law for the time being in force in that part of the United Kingdom where it is made. (Sect. 2.) And no subsequent change of domicile is to revoke, invalidate, or alter the construction of a will (sect. 3); nor is the Act itself to render any will invalid which would have been valid had the Act not passed, save in so far as such will may be altered or revoked by a subsequent will made valid by the Act. (Sect. 4.) It is to be noted that sects. 1 and 2 of Lord Kingsdown's Act apply only to British subjects, while sects. 3 and 4 apply generally. Accordingly, it has been held that when a person of Dutch domicile makes a will, and afterwards marries and acquires an English domicile, as marriage does not by Dutch law revoke a will, his will is not revoked in England. (*In the Estate of Groos*, (1904) P. 269.) It is also to be remembered that sects. 1 and 2 refer to wills not of moveables merely, but of personalty. Accordingly, a will of leaseholds in England is admissible to probate if it is made in accordance with the law of the testator's domicile, though its provisions will be invalid if they transgress English law, as, for instance, by attempting to establish a perpetuity. (*Pepin* v. *Bruyère*, (1902) 1 Ch. 24; *In re Grassi, Stubberfield* v. *Grassi*, (1905) 1 Ch. 584.) Finally, the Act applies only to wills made by persons who die after the passing of the Act (6th August, 1861). (*See* Strahan's Wills, pp. 69—74.)

By an Act passed on the same day (24 & 25 Vict. c. 121), power was given to the Crown to enter into conventions with foreign countries under which a British subject dying in any such foreign country, or a subject of such foreign country dying in the United Kingdom, is not to be considered to have acquired a domicile in the country where he died unless he has lived for one year before his decease in that country, and has also deposited in a public office appointed for the purpose a declaration in writing of his intention of becoming domiciled in such country. And for all purposes of testate and intestate succession to moveables, such person till then is to be considered to retain the domicile he possessed at the time of his going to reside there.

No convention under this Act has as yet been entered into.

Republication of Will.—Formerly, to give a will of realty validity it had to be published—that is, some act had to be done by the testator to show that he intended the instrument to operate as a will. Now no publication beyond the execution required by the statute is necessary to the validity of any will. (Wills Act, s. 13.)

Under the old law, when a codicil was added to a will, the execution and publication of this amounted to a republication of the whole will as well. In this respect the law is still unaltered. (Sect. 22, Wills Act.) The effect of this rule is sometimes to make valid a will improperly executed, and also sometimes to make good a gift under the will which previously was null and void. Thus, if a codicil, duly executed, be added to a will which was invalid through both the witnesses not being present at its execution, or which has been revoked through the subsequent marriage of the testator (*see infra*), the will is re-established. And again, if by a will a gift be made to one of the witnesses, that gift, as we have seen, is void. But if subsequently a codicil, duly executed, but attested by different witnesses, be added, then the old execution is superseded, the old witness ceases to be a witness to the will, and the gift to him becomes valid. (*Anderson* v. *Anderson*, L. R. 13 Eq. 381. Cf. *In re Hay*, *Kerr* v. *Stinnear*, (1904) 1 Ch. 317.)

An invalid will can be established, and a valid will can be republished by a re-execution in due form. (Sect. 22, Wills Act.) But no will can be re-established or revived by mere implication (*In the Goods of Steele*, L. R. 1 P. & M. 575), or by merely cancelling a subsequent will or codicil by which it was revoked (*In re the Goods of Hodgkinson*, (1893) P. 339); nor can a codicil revive a will that has been revoked by physical destruction. (*In the Goods of Reade*, (1902) P. 75.)

Revocation of Wills.—Under the Wills Act a will can now be revoked in four ways only:—

(a.) By the subsequent marriage of the testator or testatrix. (Sect. 18.)

Subsequent marriage, however, will not revoke a will made in exercise of a power of appointment, where the property so appointed would not, in default of appointment, pass to the appointor's heir, executor, administrator, or next of kin.

(b.) By a subsequent will or codicil revoking the will. (Sect. 20.)

(c.) By a writing executed like a will and declaring an intention to revoke the will. (Sect. 20; *see Toomer* v. *Sobinska,* (1907) P. 106.)

(d.) By the destruction of the will by or in the presence and by the direction of the testator with the intention of revoking it. (Sect. 20.)

The destruction of a will without any intention of revoking it will not cause its revocation; oral evidence of its contents will be heard by the Court, and the contents as thus established will be admitted to probate. Neither will the loss of a will cause revocation, nor will its intentional destruction under the false impression that it is invalid. (*Giles* v. *Warren,* L. R. 2 P. & M. 401. As to "dependent relative revocation," *see* Strahan's Wills, p. 57.) A will, however, will be sufficiently destroyed to revoke it by cutting off the signature of the testator with the intention of revoking it (*Bell* v. *Fothergill,* L. R. 2 P. & M. 148), or, when it is executed in duplicate, by the intentional destruction of one of the parts. (*Atkinson* v. *Morris,* (1897) P. 40.) And it may be partially revoked by the complete obliteration of a part of it, either by erasure, or by blotting, or by pasting paper over such part. (Sect. 21, Wills Act. *In the Goods of Gilbert,* (1893) P. 183.)

On the other hand, an intention to revoke a will, however clearly manifested, will not cause its revocation unless the will is destroyed or the intention to revoke is declared in writing duly executed like a will. Thus, cancelling a will by drawing lines through it, or writing "revoked" across it, or any other such proceeding, has no effect whatever in revoking a will. (*Atkinson* v. *Morris*, *supra*.)

Construction of Wills: General Rule.—It is commonly said that in construing a will the Court will always endeavour to discover the intentions, and will be bound by the intentions, of the testator. This rule is perfectly accurate if we remember that the intentions which the Court seeks are not the actual intentions existing in the mind of the testator when he made his will, but his intentions as expressed in the will. (Under. & Stra. on Wills, p. 63.) In this respect a will is like any other written instrument. (*Egerton* v. *Brownlow*, 4 H. L. Cas. 181.) So, too, the intention which the Court will seek is not the intention as expressed in a single sentence torn from the context, but the intention as gathered from the instrument as a whole. (Under. & Stra. on Wills, pp. 10, 31 *et seq.*) In this respect also wills are construed like other writings. (*Abbott* v. *Middleton*, 7 H. L. Cas. 68.)

The difference between the construction of wills and of other writings arises after this general intention has been ascertained. In other writings, and more especially in deeds, the general intention may be modified and even defeated by the parties having chosen to use ordinary or technical language in a sense different from that which it properly possesses. In wills, on the other hand, the general intention will override any ordinary or technical expressions which conflict with it. (*Key* v. *Key*, 4 D. M. & G. 73.) It may be noted that wills of realty are in this respect construed more strictly than wills of personalty. (*Miles* v. *Harford*, 12 Ch. D. 691.)

A further difference arises from the fact that while deeds are drawn without punctuation (*see supra, p.* 247), wills are punctuated. And in construing wills the punctuation will be taken into consideration. In *Compton* v. *Bloxham* (2 Col. 201), the decision turned on the fact that the words "my moneys" began an entirely new sentence, the Judge (Knight Bruce, V.-C.) having ascertained this by an examination of the will itself.

As has been said, the intentions of the testator must be gathered from the terms of the will. No extrinsic evidence—that is, statements of persons who knew his intentions, or contents of documents not testamentary in their nature—will be admitted to show that the intentions expressed on the face of the will were not his real intentions. Neither will extrinsic evidence be admitted to remedy what are called patent ambiguities—that is, deficiencies of expression appearing on the face of the will itself, such as a blank where the name of a legatee should have appeared. (*Re Gregson's Trusts*, 2 Hem. & M. 504.) But when a will is itself clear in its terms, difficulties may arise in applying it to the facts. For example, a legacy may be left "to my niece B. C.," and the testator may have had two nieces called B. C. (*In re Fish*, (1894) 2 Ch. 83.) Or, again, a legatee may be described as "J. Brown of Whiteacre," and on investigation it may turn out that the Brown living at Whiteacre is R. Brown, and that there is a J. Brown living at Blackacre. Such ambiguities as these are called latent ambiguities because they do not appear on the face of the will, but only arise when the time comes for applying the will to the facts. (Under. & Stra. on Wills, Art. 3.) Extrinsic evidence is admissible to explain them. (*Charter* v. *Charter*, L. R. 7 H. L. 364.)

Construction of Wills: Special Rules.—Besides this general rule of construction, which is, to a large extent, the same as is applied in the case of every written instrument, there are certain special rules applicable to wills and to wills alone. Of these, the more important have always been applied to the construction of wills of personalty, and now, by the Wills Act, they have been made applicable to wills of realty also.

It is to be remembered that rules of construction are merely guides to ascertain the testator's meaning when that meaning is not clearly expressed. Where that meaning is clearly expressed there is no need for the rule and the Court is bound by the expressed intention. This is what is meant when it is said that a rule of construction applies only when a contrary intention does not appear by the will.

(a) *Wills are to be construed as speaking from the death of the testator.* (Sect. 24, Wills Act.)

By this is meant that the will is to be read as if it had been executed immediately before the testator's death, as far as the property referred to in it is concerned. (Under. & Stra. on Wills, Art. 21.) For example, if the will gives "all my money at Child's Bank" to a certain legatee, that will mean all the testator's money at the bank not at the date of the will, but at the testator's death. In the same way, "all my land in North Hants" will include not merely all the land testator had in that county when he made the will, but also all that he acquired afterwards, and all that he sold subsequently to the will and re-purchased before death (sect. 23)—in short, all that he held at his death.

The rule that the will speaks from the death of the testator applies only to gifts described in general terms. Where the thing given is specifically identified and the extent of it marked out, only that thing so identified and limited will pass under the will. Things may be so identified in either of two ways: (a) by specific description, as "my gold repeater watch"; (b) or by reference to the date of the will, as "the estate I now own at Blackacre." And the rule does not apply at all to the persons to whom gifts are made in the will. As to them, the rule is that when a gift is made by will among persons included under a general description—that is, a class of persons—those will take under it who are within that general description, either at a time expressly fixed by the will, or, if no such time is fixed, at any time up to the period of distribution. When the period of distribution is depends upon the nature of the gift. If the gift is immediate, then the period of distribution is the testator's death. If the gift is of a remainder, it will be when the remainder comes into possession. If the gift is postponed as to vesting, it will be when the first member of the class described becomes entitled to his share. (*See* Under. & Stra. on Wills, pp. 102 to 115.) Thus, if A., by his will, gives a legacy of ready money to B.'s children without more, the persons included within this description will be B.'s children living at A.'s death; children born to B. subsequently will not participate in the gift. But if A. had first given B. a life interest in the money, and the corpus of it subject thereto to B.'s children, the persons included within this description would be the children of B. not only at A.'s death, but also all born subsequently. And if the gift had been to B.'s children on their attaining, respectively, the age of twenty-one, then all B.'s children born before the eldest attained twenty-one would be included in the gift. (*In re Mervin, Mervin* v. *Crossman*, (1891) 3 Ch. 197.)

(b) *General residuary devises and bequests carry lapsed devises and bequests.* (Sect. 25, Wills Act.)

By a general residuary devise or bequest is meant a devise or bequest giving all that remains of the realty or personalty respectively after satisfaction of the other devises and bequests contained in the will. By lapsed devises and bequests are meant devises or bequests which, for any reason, have failed to go to the person or object for whom or which they were intended. The rule itself, then, means that these devises or bequests go to the persons to whom is left the residue of the realty or personalty respectively. (Under. & Stra. on Wills, pp. 151 *et seq.*)

A devise or bequest, when it is not made for the purpose of discharging a legal or moral obligation recognised by the testator (*Stevens* v. *King*, (1904) 2 Ch. 30), lapses when the person to whom it was left dies in the lifetime of the testator, or when the object for which it was left is an illegal object. When the devise is made to two or more persons in joint tenancy, or among a class of persons, then, on the death of one of these before the testator, his share will go to the survivors, and it is only on the death of all the joint tenants, or on the failure of the class before the testator's death, that there will be a lapse. But if the devise or bequest be to two or more persons *nominatim* as tenants in common, then, on the death of one before the testator, there will be a lapse of his share of the gift. The most common cause of lapse through illegality of object has hitherto been the law as to gifts to charitable uses. Formerly it was illegal in England, though not in Ireland, to devise land for charitable uses, or to bequeath money for the purpose of purchasing land for charitable uses. This has now been altered, as to England, by the Mortmain and Charitable Uses Act, 1891, under which such devises and bequests are good, but land so devised is to be sold within a year from the death of the testator (sects. 5, 6, and 8); and money so bequeathed is not to be invested in the purchase of land. (Sect. 7.) The Act applies only to the wills of testators dying after the passing of the Act (5th August, 1891).

The Wills Act makes two exceptions to the rule that the death of a legatee or devisee in the lifetime of the testator causes a lapse. The first occurs in the case of a devise in fee tail to a person who dies in the lifetime of the testator leaving issue living at the death of the testator capable of inheriting the estate. (Sect. 32.) The second occurs in the case of a devise or bequest of more than a life interest to a child or other issue of the testator who dies in the lifetime of the testator leaving issue living at the testator's death. (Sect. 33.) There is no lapse in either of these cases. The devise or bequest goes as if the original devisee or legatee had died not before, but immediately after, the testator. Accordingly, the devise or bequest is treated precisely as if it had formed part of the devisee's or legatee's estate at his decease. Thus, in the first case the heir of the deceased devisee will take the estate tail by inheritance from the deceased devisee, not by purchase under the will making the devise, which makes a considerable difference in its descent subsequently. (*See infra, p.* 319.) In the same way, in the second case, if the deceased devisee or legatee died leaving a will containing a residuary clause, the devise or legacy will go to the person or persons entitled under such clause; if the will contained no such clause, or if the deceased devisee or legatee died intestate, it will go as undisposed of—that is, if a devise it will go to his heir-at-law, if a bequest among his next of kin, subject in case the deceased devisee or legatee was a married woman to the rights of her husband. (*Eager* v. *Furnival*, 17 Ch. D. 115; and *see infra, p.* 317 *et seq.*)

(c) *A devise without words of limitation passes all the interest testator could by his will dispose of.* (Sect. 28, Wills Act.)

As we have seen, a grant of freehold land without words of limitation passes to the grantee a life estate merely. (Under. & Stra. on Wills, pp. 197 *et seq.*) This rule of construction gives a similarly expressed gift in a will the largest meaning in accordance with the rule of construction usually applicable to deeds of grants as well as wills—that a grant is to be construed most strongly against the grantor. As to the application of this rule to rentcharges and annuities charged on land, *see infra, p.* 337.

(d) *The words "lands," and other like words, are primâ facie to include all the testator's lands of any tenure.* (Sect. 26, Wills Act.)

Before the Wills Act such an expression as "lands" carried leaseholds only when the testator had no freeholds to satisfy the gift. Now leaseholds, copyholds, mortgaged estates, lands contracted to be purchased, money held in trust subject to a direction to lay it out in the purchase of lands, &c. are included. (*In re Duke of Cleveland's*

Settled Estates, (1893) 3 Ch. 244; Under. & Stra. on Wills, Art. 29.)

(e) "*Die without issue*" *refers to a proximate, not an ultimate, failure of issue.* (Sect. 29, Wills Act.)

Before the Wills Act "die without issue" was held to refer to an ultimate failure of issue—*i.e.*, a failure either at the death of the devisee or at any subsequent time. An estate to continue during the grantee's life, and as long as he shall have issue, is a fee tail; and as the gift over was not to arise till its natural determination, such gift over was only a remainder which the tenant in tail could bar. Since the Wills Act, such an expression is to be construed as referring to a proximate failure of issue—*i.e.*, a failure at the death of the devisee. The effect of this is to turn the gift over to an executory limitation—that is, the devise is a limitation in fee tail to the devisee, subject to a condition shifting the estate over to another at the devisee's death should he not have issue then living. Here the limitation over cannot be defeated by any act of the first devisee's. In the case of a bequest subject to a similar gift over, before the Wills Act, the gift over failed. Since the Wills Act, the legatee takes an absolute interest, subject to an executory bequest over should he not have issue living at his death. (Under. & Stra. on Wills, Art. 43.)

Kinds of Legacies.—Legacies are specific, demonstrative, or general. A legacy is specific when it is of a particular thing; it is demonstrative when it is payable out of a particular fund; it is general when it is neither of a particular thing nor payable out of a particular fund. (Strahan's Eq. Art. 117.)

Specific legacies are liable to ademption; that is, if the testator sells or otherwise alienates the particular thing bequeathed, or if it be destroyed before his death, or if it be so changed as not to answer the description in the will (*see In re Slater*, (1907) 1 Ch. 665), the legacy is revoked, or rather avoided, thereby. They may, in cases where the thing given is not specifically identified, but merely generally described, be enlarged by additions to the thing made before the testator's death. Thus, a gift of "all my stock in the Midland Railway" will carry not merely the stock held by the testator at date of will, but also any acquired by him afterwards and held by him at his death. Again, they are not liable to abate on a deficiency of assets to pay all legacies given by the will. Thus, if a testator bequeaths his leasehold house to A., his grey horse to B., and 1,000*l*. apiece to C., D. and E., if after payment of his debts enough money is not left to pay C., D. and E. each 1,000*l*., these legatees have no claim to a share of the specific legacies to A. and B. Lastly, specific legacies carry with them any income accruing from them from the testator's death.

Demonstrative legacies are not adeemed by the alienation by the testator, during his life, of the fund or stock out of which they are primarily payable, nor can they be enlarged by additions made to that fund by the testator during his life. The alienation of the fund by the testator during his life merely turns them from demonstrative into general legacies. If it remains at his death, they continue demonstrative, and as such are not liable to abate if the fund be sufficient to pay them in full, and they carry income if the fund produces income.

General legacies are simple legacies payable out of what remains of the testator's estate after satisfaction of his debts, specific legacies, and demonstrative legacies. The commonest example of them is the pecuniary legacy—"I bequeath 1,000*l*. to B.," without more. They are not liable to ademption; they cannot be enlarged by additions to the general estate, except they are residuary in their character; they are liable to abate; and, as a general rule, they carry interest only from the end of the executor's year, or from the time fixed in the will for their payment.

There are three exceptions to this. Interest is payable from the death of the testator on legacies—

(a) In satisfaction of a debt (*In re Rattenberry, Ray* v. *Grant*, (1906) 1 Ch. 667);

(b) To children for whom they are the sole provision;

(c) Charged on land.

With regard to the second of these, the only interest payable is so much as is necessary for the maintenance of the children. (*In re Bowlby, Bowlby* v. *Bowlby*, (1904) 2 Ch. 685.)

With regard to the last, it is to be noted that legacies are not payable out of land unless they are expressly charged upon it. When a legacy is charged on a specific piece of land, it is itself a specific legacy, and on sale of the land charged before the death of the testator, it is adeemed (*Newbold* v. *Roadknight*, 1 R. & My. 677), and on the death of the legatee after the testator, but before payment and before the end of the executor's year, it lapses for the benefit of the land on which it was charged.

It is to be noted, further, that there is no division of devises similar to this division of legacies into specific, demonstrative, and general. All devises are in their nature specific—even residuary devises. (*Lancefield* v. *Iggulden*, 10 Ch. App. 136.)

Position of Executors.—At common law, as we have already pointed out, an executor, *qua* executor, had nothing to do with the freehold lands devised in the will of which he was executor. That will might vest these lands in him, or it might give him a power of sale over them for the purpose of raising funds to pay the testator's debts or legacies; but such rights as he thus took he took as devisee, and not as executor.

To a will of personalty, on the other hand, an executor, or an administrator with the functions of an executor, was always absolutely necessary. Accordingly, when through any cause there was no executor, or none able or willing to act, the Court appointed an administrator to act in his stead. Such an administrator is called an *administrator cum testamento annexo*—*i.e.*, with the will annexed. The person usually appointed in any of these cases is the residuary legatee.

In England, this difference in the executor's position under wills of realty and wills of personalty is abolished as to the wills of persons dying on or after the 1st January, 1898. By the Land Transfer Act, 1897, a testator's executors are made his *real* representatives, and his real estate is to be administered by his executors precisely as if it were a chattel real; and all the powers, rights, duties, and liabilities of an executor in respect of personal estate shall apply to real estate so far as the same are applicable as if that real estate were a chattel real vesting in them, save that it shall not be lawful for some or one only of several executors without the authority of the Court to sell or transfer real estate. (Sect. 2 (2); *In re Pawley and London and Provincial Bank*, (1900) 1 Ch. 58.)

A limited or special kind of administration with the will annexed is granted when the executor appointed by the will becomes lunatic before accepting or disclaiming the office. The person appointed is either the lunatic's committee—*i.e.*, guardian—or the residuary legatee (*see Part VII.*); and again, where the sole executor under the will is an infant, the person usually appointed is the infant's guardian, and he acts until the infant comes of age. (*See Part VII.*) In the latter case the administrator is called administrator *durante minore ætate*.

An administrator *ad colligendum bona defuncti* is appointed in any necessary case for the purpose not of administering the estate, but of keeping the goods in safe custody.

In all these cases, save the last, the administrator *cum testamento annexo* is practically an executor. The chief differences are that he does not derive his authority from the will as an executor does, and therefore he has no right to interfere with the estate till appointed by the Court, whereas the executor's right arises immediately upon the death of the testator; and that his office on his death before the administration is complete does not descend to his executor as an executor's office does.

Duties of Executors.—Stated shortly, the chief duties of an executor are to bury the testator in a manner suitable to his estate, to prove his will, to call in his personal estate, to pay his debts, to assent to the specific legacies, to pay the demonstrative and general legacies, and to hand over the residue of the testator's estate to the residuary legatee, if there be one, or to distribute it among the testator's next of kin if no residuary legatee be appointed by the will, or if the residuary legatee so appointed has predeceased the testator.

The assets of the testator are applicable to these purposes much in the order in which they are enumerated above. The first charge upon the assets is for funeral and testamentary expenses of deceased. Then follow expenses properly incurred in calling in the estate. Then, before legacies of any kind are satisfied, all the testator's debts must be paid. These debts are payable in a certain order. This order is not a matter of much importance where the estate is solvent; and where it is insolvent it may be wound up in bankruptcy, when the order does not apply, but the rules regulating the winding up of a living bankrupt's estate do. (*See infra, p.* 305.) It is only after all the debts have been paid or provided for that the executors are justified in assenting to the specific legacies or paying the pecuniary bequests.

Rights of Executors.—For the purpose of enabling executors to administer estates quickly and inexpensively, very large powers are now given them. Of these, the most important are as follows:—By the Conveyancing Act, 1881, s. 37, now repealed and re-enacted by the Trustee

Act, 1893, s. 21, executors may (a) pay the testator's debts on whatsoever they consider sufficient evidence of their existence; (b) accept a composition for debts due to the estate; (c) allow time for the payment of such debts; (d) compromise or submit to arbitration all debts, accounts, or claims against the estate. By the Land Transfer Act, 1897, s. 2 (2), they may sell the testator's realty for the purpose of paying his debts; but to do so, all the executors who have proved, but not those who have renounced probate or those who have not proved, must join in the sale. (Conveyancing Act, 1911, s. 12.) By the Law of Property Amendment Act, 1859, ss. 27 and 28, they can convey a lease or other property subject to a rent, covenants, or agreements, after satisfying all liabilities then accrued and setting aside a fund to satisfy liabilities which may arise in the future, and thereby free themselves from all future liability as to such rent, covenants, or agreements. And by the same Act, they can advertise for creditors of the testator to send in their claims within a certain reasonable time, and after that time has elapsed they may distribute the estate amongst those who have sent in their claims and the legatees, without being personally responsible to any creditor who has not sent in his claim. (*In re Bracken, Doughty* v. *Townson*, 42 Ch. D. 1. *See* Strahan's Wills, pp. 103—107.)

Besides these statutory powers, executors have other rights as to the payment of debts of considerable importance. Thus, they are entitled out of the legal assets of the testator which have actually come into their hands as executors (*Pulman* v. *Meadows*, (1901) 1 Ch. 233) to pay themselves debts owed to them by the testator before paying the debts of other creditors of equal degree. This is called an executor's *right of retainer*. Again, among creditors of equal degree, they can prefer one to another. (*In re Samson, Robbins* v. *Alexander*, (1906) 2 Ch. 584.) Where a pecuniary legacy is left to a debtor of the testator, they are entitled to retain enough of the legacy to pay the debt. (*See In re Savage*, (1918) 2 Ch. 146.) Moreover, they can, if they please, pay any debt due by the testator though barred by the Statutes of Limitation, provided an action to recover it had not been defended and judgment given against the creditors (*Midgley* v. *Midgley*, (1893) 3 Ch. 282); or provided there has been no administration decree (*Shewin* v. *Vanderhorst*, 1 Russ. & M. 347), or the residuary legatee has not obtained an order of the Court restraining them from so doing. (*In re Wenham, Hunt* v. *Wenham*, (1892) 3 Ch. 59.) An executor is not entitled to carry on the testator's business, unless he is expressly authorized to do so by the will; and if he does carry it on without such authority, he does so at his risk. If, however, he is authorized to carry it on, and if the testator's creditors assent, he is entitled to an indemnity out of the estate for all debts contracted by him in properly carrying on the trade. (*Dowse* v. *Gorton*, (1891) App. Cas. 190; *and see In re Healy*, (1918) 1 Ir. R. 366.)

As between the beneficiaries and the creditors of the testator, the latter are entitled to have their debts satisfied out of any part of the testator's estate. It is all liable for the testator's debts, and creditors who have obtained judgment for their debts are entitled to seize in execution whatever part of it is most convenient to them to seize. But as between the beneficiaries themselves the estate is liable in a regular order. (*See* Strahan's Eq. Art. 218.) That order is as follows:—

(1) Personalty not disposed of by the will or disposed of by way of residue, and personalty over which the deceased has exercised a general power of appointment by a residuary clause in his will. (*Williams* v. *Williams*, (1900) 1 Ch. 152.)

(2) Real estate devised for the payment of debts.

(3) Real estate not disposed of.

(4) Real estate disposed of, but charged with debts.

(5) General legacies.

(6) Devises not charged with debt and specific legacies.

(7) Realty or personalty over which the deceased has exercised specifically a general power of appointment.

(8) The paraphernalia of the widow; *i.e.*, her necessary clothing and personal ornaments given to her by the deceased, not absolutely, but to wear as his wife. (*Tasker* v. *Tasker*, (1895) P. 1.)

The beneficiaries whose interests come under any of the later of these heads are entitled, as against the beneficiaries whose interests come under earlier heads, to insist that the parts of the estate included under those earlier heads shall be exhausted in the payment of the testator's debts before their interests under the will are touched. And if a creditor seizes anything coming within a later head—*e.g.*, a specific legacy—the beneficiary who would have been entitled to that thing can claim the value of it from the beneficiaries liable before him, unless their interests have already been entirely swept away. It is to be noted that the Land Transfer Act, 1897, makes no difference in the order of liability between beneficiaries. (Sect. 2 (3).)

Sub-section 2.

TRANSFER BY OPERATION OF LAW.

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Devolution.—Transfer of ownership by operation of law may for brevity be called devolution. Devolution, then, like alienation (of which, indeed, it is only a species—involuntary alienation), may be divided according as the devolution may take place during the life of the owner whose interest is transferred or can only take place on his death. In the former case it may be called devolution *inter vivos*, and in the latter, devolution *mortis causâ*.

Part A. *Devolution inter vivos.*

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Devolution inter vivos.—A devolution of ownership *inter vivos* may take place in consequence of (a) a judgment being given against the owner; (b) the bankruptcy of the owner; (c) or long possession against the owner.

(a) **Judgment.**—Actions at law or in equity may be either for the recovery of a particular thing, or for the recovery of a sum of money. Now in neither of these cases can the judgment itself be said, as a rule, to transfer the ownership of anything. In the first instance, all that the judgment does is to determine which of the parties is legally entitled to a certain thing. It does not transfer, but ascertains, the ownership. Exceptions to this formerly occurred in the case of recoveries, and may still be considered as occurring in foreclosure actions. In the second instance, the judgment merely creates, or renders enforceable, a debt as between the parties to it. The enforcement or execution of the judgment may, however, in this instance, result in a transfer of ownership. The person against whom judgment has been recovered may hand over money to the other party in satisfaction of it, or his goods and leaseholds may be seized by the sheriff under a writ of *fieri facias*, or his freeholds may be extended under a writ of *elegit*. Where goods are seized they must be sold; but where freeholds are extended under a writ of *elegit*, they are valued and then handed over by the sheriff to the judgment creditor, who acquires thereby a chattel interest in them till his debt is paid.

Two other cases in which the carrying out of a judgment or order of the Court may transfer the ownership of a thing are (1) when a sale is made by the order of a Court of competent jurisdiction; (2) when a sale is made by the high bailiff of a County Court in execution of a judgment. The peculiar characteristic of both of these is, that the purchaser takes a good title to the thing sold, to whomsoever it belongs. (As to sales by order of a Court, *see* sect. 21 (2), Sale of Goods Act, 1893; and as to sales by high bailiffs of County Courts, *see Goodlock* v. *Cousins*, (1897) 1 Q. B. 558.)

(b) **Bankruptcy.**—When a person is unable or unwilling to pay his debts, he may, on the petition of himself or of a creditor of his, be adjudicated bankrupt. The effect of such an adjudication is that all his property, whether realty or personalty, and whether corporeal or incorporeal—save only a right of action for a tort to his person (*see infra, p.* 303)—becomes vested in the trustee or assignee in bankruptcy. Thus there is a universal succession *inter vivos*, and accordingly bankruptcy must be ranked, like judgment, as a mode of acquiring title to things.

At the same time, just as judgment in an action at law is a step towards enforcing payment of a particular debt, so bankruptcy is a step towards enforcing payment of debts generally. As such it does not properly belong to the law of property, but rather to the law of actions. It will be sufficient, then, to give here a very slight sketch of the law on the subject.

The law as to bankruptcy in England and Ireland differs. In England it now depends on the Bankruptcy Act, 1914, which consolidates the Bankruptcy Act, 1883, and several amending Acts. That Act, however, does not apply to Ireland. The law there depends primarily on the Irish Bankrupt and Insolvent Act, 1857, and the Bankruptcy (Ireland) Amendment Act, 1872. The law as enacted by these statutes roughly corresponds to the English law of bankruptcy before the passing of the Bankruptcy Act, 1883.

In both countries, to give the Court of Bankruptcy jurisdiction, it is necessary that the debtor should be guilty of an act of bankruptcy. In England a debtor commits an act of bankruptcy if he (a) makes an assignment of property in trust for creditors generally; (b) makes a fraudulent conveyance of property; (c) makes a conveyance of property which would be a fraudulent preference if the debtor were adjudged bankrupt (*see infra, p.* 305); (d) departs from or remains out of England, departs from his dwelling-house, or absents himself in any other way, or keeps house with intent to defeat or delay his creditors; (e) has his goods seized in execution and sold; (f) files a declaration of insolvency, or presents a petition in bankruptcy; (g) is served with a bankruptcy notice requiring him to pay a debt for which judgment has been recovered, and fails to pay within seven days of service thereof; (h) gives notice to his creditors that he is about to suspend payment of his debts. (Sect. 1, Bankruptcy Act, 1914.) To make any of these acts an act of bankruptcy on which a petition can be based, it must have been committed within three months of the petition in question. (Sect. 4.)

In Ireland the law is somewhat different. In the first place, the distinction between trader and non-trader still exists there. Departure from dwelling-house, or otherwise absenting himself, and keeping house with intent to delay or defeat creditors, and seizure and sale of goods, are acts of bankruptcy in Ireland only when the debtor is a trader. In the second place, instead of procedure by bankruptcy notice, there is a proceeding by debtor's summons. Any creditor (not necessarily a judgment creditor) to whom at least 20*l.* is due, and who has made reasonable efforts to obtain payment and failed to do so, may apply to the Court for such a summons. The debtor has then a limited time (seven days for a trader, twenty-one days for a non-trader) within which he may apply to the Court to have the summons dismissed; if it is not dismissed, or if the debtor does not satisfy the creditor's claim, the creditor can apply to the Court to have the debtor adjudicated bankrupt. (Sect. 30, Act 1872.) Lastly, the act of bankruptcy may occur any time within six months of the petition.

On the commission of an act of bankruptcy, any creditor of the debtor may petition the Court to adjudicate him bankrupt, subject to two conditions. The debt due to the petitioning creditor must have existed at the time the act of bankruptcy was committed, and it must be for an unsecured sum of at least 50*l*. (Bankruptcy Act, 1914, s. 4.) In Ireland, the debt on which an adjudication is founded must be at least 40*l*. (sect. 20, Act 1872), although, as has been said above, a creditor to the amount of only 20*l*. can initiate proceedings by debtor's summons, and two or more creditors are apparently allowed to join in making up the necessary 40*l*.

If the bankruptcy petition be not dismissed, the result is that, in England, a receiving order is made against the debtor vesting the management of his affairs in the official receiver. (In Ireland he is at once adjudged bankrupt.) After the receiving order is made, a meeting of the debtor's creditors is called. The debtor submits to it a statement of his affairs, he is subjected to a public examination, and, if he has any proposal to make, it is submitted to his creditors for their approval. If the creditors pass a resolution that the debtor should be declared bankrupt, or if they pass no resolution, or if they do not meet, or if his proposal (if any) be not approved by the creditors and the Court, the debtor is adjudged bankrupt. (Sect. 18.)

On adjudication, the following vest immediately and without conveyance, in England, in the official receiver, or (if one be appointed) in the trustee appointed by the creditors (sect. 54); in Ireland, in the official assignee:—

(*a*) All the land, whether freehold or leasehold, and all the goods and chattels belonging to the debtor at the date of the bankruptcy:

To this there are two exceptions: (1) Property held by the debtor as trustee; (2) Tools of his trade, together with necessary wearing apparel and bedding for himself, his wife and family, to a value altogether of not more than 20*l*.:

(*b*) All debts due to the debtor:

(*c*) All remedies for breach of contract and for torts, save torts against the person of the debtor:

(*d*) The right to execute a power which the bankrupt could have exercised for his own benefit:

(*e*) As long as the bankrupt remains undischarged, all property which may come to him by purchase, devise, bequest, descent, or in any other way:

(*f*) All goods not belonging to the bankrupt, but being at the commencement of the bankruptcy in the possession, order, and disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner under such circumstances that the bankrupt is the reputed owner thereof. Things in action, save debts due to the bankrupt, however, do not come within this provision. (Sect. 38, Bankruptcy Act, 1914.)

The trustee, however, if he finds that any property which belonged to the bankrupt is burdened with onerous covenants, or that any contracts made by him are unprofitable, may disclaim them within twelve months after the first appointment of a trustee; but the trustee cannot disclaim a lease without the consent of the Court, and he cannot disclaim any property where he has declined or neglected to disclaim it for twenty-eight days after he has been applied to in writing by any person interested in the property requiring him to decide whether he will disclaim or not, and if he does not disclaim a contract within such time after such notice, he will be taken to have adopted it. (Sect. 54, Bankruptcy Act, 1914; *see In re Cohen*, (1905) 2 K. B. 704.) The effect of such disclaimer is to free the bankrupt's estate from any future liability under the covenants or contracts, and the persons injured by such disclaimer are creditors of the bankrupt's to the extent of such injury.

Not merely does the adjudication divest the bankrupt of all his property and proprietary rights, but it also renders invalid certain dispositions made by him before his bankruptcy. Thus, if he has made a voluntary settlement--that is, a settlement without marriage or valuable consideration to support it—within two years of his bankruptcy, it is void *ipso facto* on his becoming bankrupt; and if he made it more than two but less than ten years before the bankruptcy it will be void, unless he can show he was able to pay his debts at the time he made it without the aid of the property settled. (Sect. 42 (1), Bankruptcy Act, 1914.) The settlement, however, is void only from the date of the bankruptcy. If anyone has acquired *bonâ fide* and for value an interest in the property included under the settlement before the trustee's title arose, that interest will be good against the trustee. (*In re Carter and Kenderdine's Contract*, (1897) 1 Ch. 776.)

Again, if he has made a contract or covenant in consideration of marriage for the future settlement on his wife or children of any money or property in which he had not, at the date of his marriage, any estate or interest, vested or contingent, in possession or remainder, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, the contract or covenant will be void as against his trustee in bankruptcy, and any transfer of property (not being payment of premiums on a policy of life assurance) made in pursuance of such a contract or covenant shall be void against the settlor's trustee unless the persons benefiting under it can prove either (a) that the transfer was made more than two years before the bankruptcy, or (b) that at the date of the transfer the settlor was able to pay all his debts without the property transferred, or (c) the transfer was in pursuance of a contract or covenant to transfer property expected to come to the settlor on the death of a person named in the contract or covenant and was made within three months after that person's death. (Sect. 42 (2) and (3).)

Neither of these provisions applies to a settlement on his wife or children, made by the bankrupt, of money or property which has accrued to him in right of his wife, and in both cases the trustees of the settlement can, where it is void, prove in the bankruptcy under the covenant or contract (*ibid.*); and in Ireland neither of the corresponding provisions applies, except where the bankrupt is a trader. (Sect. 52, Act of 1872.)

Again, if the bankrupt has within three months preceding the presentation of the petition on which he was adjudged bankrupt, and when unable to pay his debts as they became due out of his own moneys, transferred any property, made any payment, taken or suffered any judicial proceeding, or incurred any obligation for or in trust for any creditor with the view of giving such creditor a preference over the other creditors, such transfer, payment, judicial proceeding, or obligation is to be fraudulent and void as against the trustee in bankruptcy; provided always, that the rights of persons buying in good faith from such creditor shall not be affected. (Sect. 44, Bankruptcy Act, 1914.)

It is not necessary here to enter at length into the administration of the bankrupt's estate. Suffice it to say, that it is the duty of the trustee or assignee to realise it as cheaply and as expeditiously as possible, and the bankrupt is bound to give him every assistance in his power so to do. From time to time, as the estate is realised, and subject to costs and expenses, instalments of, or dividends upon, their debts are paid to the creditors until the whole estate is thus disposed of. The principle followed is payment of all debts *pari passu*, subject to this, that a few debts are preferred and a few postponed. The debts preferred to others are (i) parochial and local rates; (ii) clerks' and servants' wages not exceeding 50*l*.; (iii) workmen's wages not exceeding 25*l*.; (iv) and valid claims under the Workmen's Compensation Act, 1906. (Bankruptcy Act, 1914, s. 33.) The postponed debts are (i) debts due to a wife by a bankrupt husband or to a husband by a bankrupt wife for purposes of trade, or in the husband's case for any purpose (sect. 36); and (ii) money lent to the bankrupt for the purposes of his business where the rate of interest depends on the profits made. (Partnership Act, 1890, s. 3.) The debtor can apply to the Court for his order of discharge (in Ireland, a certificate of conformity),—that is, his relief from the disabilities of bankruptcy. This order the Court may refuse altogether, or may suspend for a time fixed by it, in case the debtor has been guilty of practices specified in the Bankruptcy Act, 1914, s. 26, or it may grant it subject to conditions; as on condition that the bankrupt consents to judgment being entered against him for the unpaid balance of his debts; or it may grant it immediately and without conditions, upon coming to the conclusion that the bankruptcy was due to misfortune, without any misconduct on his part (sect. 26); or it may, where it is of opinion the debtor should never have been adjudicated bankrupt or where the debts are paid in full, annul the adjudication. (Bankruptcy Act, 1914, s. 29.)

(e) **Long Possession.**—A person in possession of a thing of which he is not the owner is entitled to retain possession of it against every one except the true owner. (*Armory* v.

Delamiric, 1 Strange, 504; 1 Sm. L. C.) This rule applies whether the thing in question is land or goods. When, however, it is land, a further rule applies. In that case, if the person in possession retains possession for a certain period without acknowledging the owner's title, his possession will draw to it the ownership; in other words, the title of the true owner will be transferred by lapse of time to the person in possession of the land. (*See In re Nesbitt & Pott's Contract*, (1905) 1 Ch. 391.) In order that possession may thus transfer the ownership from the true owner to the person in possession, the possession need not be adverse to the true owner—that is, the land need not be held in a way inconsistent with the title of the true owner; but the true owner must be actually dispossessed or have actually discontinued possession. (*Littledale* v. *Liverpool College*, (1900) 1 Ch. 19.) Title thus acquired is called title by long possession. (*Marshall* v. *Taylor*, (1895) 1 Ch. 641.)[1]

As just stated, this rule applies only to the ownership of, or rights over, land. Strictly speaking, there is no such thing as title by long possession to goods. Mere length of possession, without acknowledgment of the true owner's title, does not transfer the ownership of goods from the true owner to the person in possession of them. (*Dawkins* v. *Lord Penrhyn*, 4 A. C. 51.) Under the

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[1] The law as to acquisition of title to land by long possession seems to have been much modified, as far as registered land is concerned, by sect. 12 of the Land Transfer Act, 1897 (re-enacting and amending sect. 21 of the Act of 1875). It is hard to say with confidence the exact effect of this section, but generally it seems to be that while the registration of a person not in possession as first proprietor can in no way prejudice the rights of the person in possession of the land, yet a transferee for value from such registered proprietor is entitled to recover the land from the person in possession, however long he may have been in possession, unless that person has previously applied to the Court to have the register rectified, and has himself registered as proprietor in place of such first registered owner or transferee. (*See* Brickdale & Sheldon's L. T. Acts, p. 302.)

Limitation Act, 1624,[1] however, much the same result is produced by a provision which bars actions for the recovery of goods—actions of *trover* and *detinue*, as they were formerly called—after the lapse of six years. In order that this enactment may operate, the possession of the goods must be adverse, that is, the possessor must hold them with the intention of retaining them against the true owner. (*Philpott* v. *Kelly*, 5 A. & E. 103.) And even then the property in the goods is not changed by the statute, but the remedy for the wrongful detention only is barred, and if the true owner obtains possession of them without action, the person who had them in his possession over six years has no right to recover them from him. (*Miller* v. *Dell*, (1891) 1 Q. B. 468.)

In form, long possession of land is in English law treated as if it were not a mode of acquiring ownership, but merely, as in the case of goods, a limitation of actions for its recovery. Thus, the Acts dealing with it are always described as the Real Property Limitation Acts, 1833 and 1874; and their provisions take the shape of prohibitions of actions for the recovery of land after the lapse of a certain period from the date on which the right to bring them first accrued. Yet, nevertheless, these prohibitions have the effect of extinguishing the original owner's title, and of creating a new one by usucapion or prescription in the person in possession. (Sect. 34.) The term "prescription" is used technically in English law merely as describing the title under which easements and *profits à prendre* may be acquired by long enjoyment.[2] (*See infra, p.* 334.)

The law relating to limitation of actions as to real property is now contained in the Real Property Limitation Acts, 1833 and 1874, the latter of which Acts is an amendment of the former, and is to be read with it. Sect. 1 of the latter Act lays down the general rule that no person shall make an entry or distress, or bring an action or suit to recover any land or rent, but within twelve years after the right to make such entry or distress, or bring such action or suit, first accrued. Rent here means rentcharge, not arrears of rent due under a lease. (*Grant* v. *Ellis*, 9 M. & W. 113.) An acknowledgment in writing, however, given by the person in possession of the land to the true owner will prevent the operation of the statute, and the receipt of rent payable by a tenant from year to year, or other lessee, will be sufficient to prevent the statute operating on his behalf. (Real Property Limitation Act, 1833, s. 14.)

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[1] This statute never applied to Ireland. Similar provisions were, however, contained in 10 Car. I. sess. 2, c. 6 (Ir.), which have now been repealed and re-enacted by sects. 20—23 of the Irish Common Law Procedure Act, 1853.

[2] Title to mines can be acquired only by long enjoyment taking the form of possession of the mines, not merely of working the minerals. (*Thompson* v. *Hickman*, (1907) 1 Ch. 550.)

Sect. 2 of the Act of 1874 deals with interests in expectancy. The right to make an entry or distress with regard to them is to be deemed to arise on their becoming interests in possession by the determination of the particular estate. Where the owner of the particular estate was out of possession, then the owner of the estate in expectancy has only six years from the time when his own interest came into possession, or twelve years from the particular estate becoming an interest in possession, whichever may be longer, to bring action.

The operation of the statutes, moreover, may be delayed or prevented by the disability of the person claiming. Disabilities within the statute are infancy, coverture, idiotcy, lunacy, or unsoundness of mind. (Real Property Limitation Act, 1874, s. 3.) Formerly, absence beyond the seas also ranked as a disability, but this is now altered. (Sect. 4.) Where disability exists, a further period of six years from the removal of the disability, or from the death of the person entitled, is allowed, provided the whole period does not exceed thirty years. (Sect. 3.) Two further points are to be noted with regard to disability.

Where a person under disability dies, no additional time will be allowed on account of the disability of any other person. (Act of 1833, s. 18.) And if the person entitled was not under disability at the time the right accrued, no subsequent disability will affect the operation of the statute.

Another fact that may prevent or delay the operation of the statute is the existence of concealed fraud. Where the person who sets up the title by long possession (*In re McCallum, McCallum* v. *McCallum*, (1901) 1 Ch. 143) has obtained possession by secret fraud, then the twelve years will be counted, not from the time when an action might have been brought by the person rightfully entitled had he known of the fraud, but from the time he discovered the fraud, or might, with reasonable care, have discovered it. (Act of 1833, s. 26.)

Lastly, the ordinary Statutes of Limitation, though they apply to equitable interests in land (Act of 1833, s. 24), do not apply to interests, whether in land or goods, secured by an express trust. But mortgages made by way of trust for sale are mortgages within sect. 7 of the Real Property Limitation Act, 1874, and by sect. 10 of the same Act, in the case of money or a legacy charged upon land and secured by means of an express trust, the remedy as against the land is barred just as if no trust existed. And although a trustee cannot prescribe for land or goods held by him as trustee, still actions for innocent breaches of trust are now subject to limitation like actions for debt, as we have already seen. (*See supra, p.* 121.)

As has been said, the right to recover debts is barred under much the same circumstances as title by long possession is acquired. It will not be necessary, therefore, to repeat what we have here said when referring to what is, strictly speaking, not acquisition of title, but merely limitation of action. To save recurrence to the topic, we have put in Appendix F. a short table giving the periods of limitation for claims to debts, legacies, rents, rentcharges, and such like, besides the periods of limitation as against the Crown and in other special cases, and also for the acquisition of easements.

Part B.—*Devolution mortis causâ.*

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Devolution mortis causâ.—Devolution *mortis causâ* arises where the ownership of a thing is transferred by operation of law to a new owner in consequence of the death of its previous owner. Between individuals, the new owner's title to the thing in question may arise from the relation of lord and tenant, or of husband and wife, or of common ancestry having subsisted between him and the previous owner. In the absence of such relationships, the Crown may be entitled to the goods, and sometimes in defeasance of them it may be entitled to both the land and goods, of the deceased. It will not, however, be necessary or expedient to treat of devolution to the Crown separately from devolution to a new private owner.

(a) **Escheat and Forfeiture.**—Escheat, as we have seen, is an incident of fee simple ownership of land. When a tenant in fee simple is attainted, or dies intestate and without heirs, his fee simple lands escheat or revert to the lord of whom he held them.

Strictly speaking, escheat is not always a title arising *mortis causâ*, since attainder, which causes it, may take place during the tenant's natural life, though upon attainder he became civilly dead. Practically, however, attainder as a cause of escheat has ceased to exist.

Formerly, judgment of death by a Court of Common Law whether followed by execution or not, abjuration of the realm, or outlawry, caused attainder. Of these three causes the last is the only one (if any) which is now effective, abjuration of the realm being long obsolete, and judgment of death no longer operating as a cause of attainder. (Forfeiture Act, 1870.)

The usual cause of escheat now is the death of the tenant intestate and without heirs. Failure of heirs most commonly arises through the tenant being a bastard, and, as such, incapable of having any heirs save heirs of his body. Formerly, attainder also led occasionally to a failure of heirs, as it caused what was called corruption of blood, *i.e.*, heirship could not be traced through a person who had been attainted. Corruption of blood, however, has been abolished by the statute abolishing attainder on judgment of death.

Escheat being an incident of tenure, when in default of any mesne lord, the Crown takes escheated fee simple lands, it takes them as lord paramount. Forfeiture, on the other hand, has nothing to do with tenure. The Crown there confiscates the tenant's land as part of the penalty payable for a crime committed by him.

Forfeiture followed attainder, but, unlike escheat, it applied not merely to the felon's land, but also to his goods and chattels. If the attainder resulted from a conviction of high treason, the mesne lord's right to escheat was defeated, and all the traitor's fee simple lands, and to a certain extent his fee tail estates (*see* 26 Hen. VIII. c. 13, s. 5), and all his goods and chattels, were forfeited to the Crown. If the attainder resulted from a conviction of felony merely, the felon's goods and chattels were forfeited to the Crown; but his fee simple lands escheated to his lord subject—if he held under a mesne lord—to the right of the Crown to the use and profits of the land for a year and a day. The abolition of attainder, save in case of outlawry, was accompanied by the abolition of the forfeiture which resulted from it.[1] (Forfeiture Act, 1870.)

Formerly, aliens were not permitted to hold freehold interests in land, or chattel interests of more than a certain duration. (32 Hen. VIII. c. 16, s. 23; 7 & 8 Vict. c. 66.) If an alien violated this rule by taking a greater interest than the law allowed, the interest so taken, on death of the alien, or after investigation and office found, whichever first happened, became forfeited to the Crown. This has now been altered, and an alien can hold any interest in English land. (*Infra, p.* 385.)

Escheat was an incident of every legal estate in fee simple, but it did not apply to equitable estates, as they were not the subject of tenure. As a result, the legal estate of a trustee, on his death without heirs or on his attainder, escheated to the lord or Crown; but on the death without heirs, or on the attainder of a tenant in fee simple of an equitable estate, his interest did not escheat —the trustee or owner of legal estate as *terre tenant* held the land discharged of the trust. After being suspended by temporary statutes, the escheat of a trustee's estate was finally abolished by sect. 46 of the Trustee Act, 1850 (*and see* now sect. 30, Conveyancing Act, 1881); and by sect. 4 of the Intestates' Estates Act, 1884, equitable interests are rendered liable to escheat on the death of their owner intestate and without heirs. The escheat appears to be to the Crown. (*In re Wood, Attorney-General* v. *Anderson*, (1896) 2 Ch. 596.)

(b) **Marriage.**—Before the Married Women's Property Act, 1882, marriage ranked among the causes of a devolution of ownership *inter vivos* as well as *mortis causâ*. Then when a woman owning property married, the husband immediately became entitled, unless his common law rights were avoided by a settlement, to very large interest in her realty and personalty. He was entitled to the rents and profits of her freeholds during the coverture, and if such freeholds were heritable, and he had issue born alive by her who could inherit them, he was, in case she predeceased him, entitled to a life estate in all of them of which she was seised in possession at her death. This life estate was called an estate *by the curtesy of England*. As to her leaseholds, he was entitled to them absolutely during the coverture. He could alienate them without her consent—a power which he did not possess over her freeholds; the latter could only be alienated by her consent, which had to be acknowledged by her separately. Moreover, if he outlived her, he was entitled to her leaseholds absolutely. If, however, she outlived him, and he during the coverture did not alienate them, they on his decease survived to her independently of his will and debts. Her goods and chattels—choses in possession—vested absolutely and for all purposes in him immediately on the marriage. Choses in action (*see infra, p.* 348), on the other hand, were like leaseholds; they vested in the husband during the coverture, and if allowed to remain choses in action till the death of the husband or wife, they then survived to the survivor. If the husband, however, reduced them into possession during the coverture, they then, being choses in possession, vested in him absolutely.

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[1] Forfeiture of both land and goods sometimes resulted from convictions for other offences than treason and felony. (*See* 2 Bl. Com. 267, 419.) These forfeitures, however, were sanctioned by particular statutes, not by the general law. This difference between forfeiture of lands and goods may be noticed. The forfeiture of lands related back, after conviction, to the date when crime was committed; forfeiture of goods applied only from time of conviction.

These common law rights of a husband were often avoided by means of a settlement to the wife's separate use. The effect of such a settlement was to deprive the husband of all rights over the wife's property during her life. Moreover, on her predeceasing him, if she left a will, the property went under it precisely as if she had been unmarried. If, however, she died intestate, the husband's common law rights revived. He was entitled to an estate by the curtesy in her freeholds, to her leaseholds and goods absolutely, without taking out letters of administration of her estate, and to her choses in action on taking out such letters.

The effect of the Married Women's Property Act, 1882, has practically been to make all the property of women married since 31st December, 1882, and all the property accruing since that date to women married before it, the wife's separate estate without the necessity of a settlement. (Sect. 1.) During the wife's life the husband has no right to any share of or interest in the statutory separate estate. She can deal with it as she pleases without his consent, and if she lends it to him, she is entitled to recover it back. If he predeceases her, it remains her property; if she predeceases him, it will go under her will should she leave one, but should she leave no will, his common law rights revive. He is then entitled, subject to her debts, to her goods and chattels real absolutely, without taking out administration (*In re Evans' Estate* (1910), 1 Ir. R. 95), to her choses in action on taking out administration, and to an estate by the curtesy on her heritable freeholds, provided he had issue born alive by her who might have inherited them.

Marriage never entitled a wife to any interest in her husband's lands or goods during the coverture. Unless, however, where she had, before marriage, given up the right in consideration of a jointure settled upon her (27 Hen. VIII. c. 10), she was entitled, in case he predeceased her, to *dower* out of all the heritable lands the legal interests in which had at any time during the coverture been vested in her husband in severalty, and to which any issue she might have had might possibly have been heir. Her right to dower accordingly became a burden upon the land, which remained upon it even though her husband had sold the lands before his death, or even though he devised them to someone else. By the Dower Act, 1833, the law has been altered as to women married since 1st January, 1834. A widow's right to dower is now defeated by the alienation of the husband's lands during his life or by his will (sect. 4), and it is subject to all partial alienations, and all charges created by him by any disposition or will, and also to all debts, incumbrances, and contracts affecting his lands. (Sect. 5.) And further, the widow's right may be defeated by a declaration against dower made by the husband by deed or by will. (Sects. 6, 7, and 8.)

Where the right is not defeated by any of these means, a widow is still entitled to a life estate in one-third of the heritable lands which her husband dies seised of or entitled to (sect. 3, Dower Act), whether his interest in them is legal or merely equitable. (Sect. 2.) If the lands be subject to the custom of gavelkind, her right is to a life estate in a moiety of them, but it continues only so long as she remains unmarried and chaste. The Statute of Limitations only begins to run against a widow's right to dower from the date of the assignment of her share. (*Williams* v. *Thomas*, (1909) 1 Ch. 713.) And the Dower Act does not bar her right to it as against her husband's creditors. (*Northern Bank* v. *M'Mackin* (1909), 1 Ir. R. 374.)

As to his goods and chattels real on the death of a husband intestate, these vest in the President of the Probate Division of the High Court. The Court appoints someone—usually the widow—to administer them. (*See infra, p.* 318.) When the deceased's estate has been realized and his debts paid, the widow is entitled, under the Statutes of Distribution, 1670 and 1685, to one-third of the residue absolutely, if the husband has left issue living at his decease, or to one-half absolutely if he has left no such issue.

Under the Intestates' Estates Act, 1890, the widow of a person dying childless and intestate since 1st September, 1890, is entitled to a first charge of 500*l*. upon his estate, payable rateably out of his net realty and personalty. (*See In re Heath, Heath* v. *Widgeon*, (1907) 2 Ch. 270.) This charge is over and above any share she may be entitled to out of the residue of the estate, which residue is to be treated, as far as her claims are concerned, as if it were the whole net estate. The Act does not apply in cases of merely partial intestacy. (*In re Twigg, Twigg* v. *Black*, (1892) 1 Ch. 579.)

(c) **Intestate Succession.**—We have already pointed out the great difference which before the Land Transfer Act, 1897, characterized the operation of a will of lands and of a will of goods. Much the same distinction appeared in the devolution of land and goods under an intestacy. Hitherto on the death intestate of a tenant in fee simple or in fee tail, his lands vested immediately in his common law or customary heir, or his heir of the body, according to their tenure and his estate. The heir became at once the owner of them without the intervention of the Courts or the State. Indeed, they were vested in him more completely than they could be by an ordinary conveyance, since a grantee can disclaim or refuse a gift by deed or will; but an heir could not disclaim a freehold coming to him by descent. On the other hand, on the death intestate of an owner of chattels real or personal, these always vested, not in his next of kin, but in the President of the Probate Division. (Court of Probate Act, 1858, s. 19.) The Court handed them over to an administrator whom it appointed by the grant to him of letters of administration. The administrator then occupied much the same position as an executor under a will. He realised the assets of the deceased, paid his debts, and then divided the surplus among his next of kin according to the Statutes of Distribution. He has the same powers of settling claims, and the same time—one year—for administering the estate, as an executor. (Trustee Act, 1893, s. 21.)

In England, this difference in the devolution of realty and personalty on the death of their owner is, as far as devolution to the administrators is concerned, now abolished as to the estates of persons dying on or after the 1st January, 1898. Realty now devolves on the administrators, who have the same rights over its administration as if it were not pure realty, but a chattel real. The subsequent devolution of realty will, however, remain unaltered, the administrators being merely trustees for the persons who are heirs to it by the common law or custom affecting it. These are entitled to demand its conveyance to them by the administrators at any time after the expiration of a year from the intestate's death.[1] (Land Transfer Act. 1897, ss. 1, 2, and 3.)

These differences may be noticed between the office of executor and that of administrator. The right of an executor arises under the will, and therefore it dates from the death of the testator. The right of an administrator arises under the grant of the Court, and therefore it dates, not from the death of the intestate, but from the grant. On the death of an executor, his office survives to his executor if he have one, but not to his administrator if he dies intestate. On the death of an administrator, his office becomes vacant until a new grant is made to some other person. The new administrator is called administrator *de bonis non*, *i.e.*, of the goods not administered by the first administrator.

The common law rules governing the descent of heritable freeholds were reduced to certain canons by Lord Hale. They have, since then, been modified by the Inheritance Act, 1833 (amended by the Law of Property Amendment Act, 1859, ss. 19 and 20), which applies to the estates of persons dying on or after 1st January, 1834.

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[1] It should be noted that while administrators can vest the intestate's realty in the heir only by a regular conveyance, executors can transfer it to the devisees entitled under the will by a mere assent to the devise as if it were a bequest of a chattel real. (*In re Pix, Plomley* v. *Stileman,* W. N. (1901) 165.)

The distribution of the surplus of an intestate's personal estate after payment of his debts is regulated by the Statutes of Distribution, 1670 and 1685, as modified, as regards the widow's share, by the Intestates' Estates Act, 1890, already referred to. We will endeavour to make clear the difference between the two systems of succession by stating the chief canons of descent, and contrasting them with the analogous rules applying to personalty.

Before doing so, however, it may be well to point out that the right to inherit freeholds and the right to claim a share of an intestate's personalty depend equally on kinship. In both cases, generally speaking, the rule is that the nearest in blood shall succeed; but in both cases (and more particularly in inheritance) this rule is modified by the special rules now to be stated. Degrees in kinship are counted, as between lineal ancestor and descendant, by the number of generations between them, and as between collateral relatives by the number of generations from one relative up to the common ancestor and down to the other relative. Thus, for example, father and son are in the first degree of kinship, grandfather and grandson in the second, and so on. On the other hand, brothers also are in the second degree—from one brother to the father being one degree, and from father to the other brother a second; while uncle and nephew are in the third—first, uncle to his father; second, father to uncle's brother; third, uncle's brother to nephew.

We have already dealt with the widow's and widower's rights in case of intestacy. We will therefore confine ourselves now to the rights arising from kinship—that is, blood relationship.

(a) Heritable freeholds: *Descent is traced from the last purchaser.*

Personalty: *The intestate is always the stock of succession.*

This rule as to heritable freeholds was introduced by sect. 2 of the Inheritance Act, 1833. The old rule was that descent was to be traced from the last owner seised in possession.

By "purchaser" is meant an owner who acquires in any other way than by descent from some other owner or by escheat, enclosure, or partition. (Sect. 1, Inheritance Act, 1833; Co. Litt. 1 b.) Thus, A. buys Blackacre and Whiteacre. He devises the former to B., who is also his heir-at-law, but he dies intestate as to the latter, to which, however, B., as his heir-at-law, succeeds by descent. On B.'s death intestate, Blackacre, of which, as devisee, he was purchaser (Inheritance Act, 1833, s. 3; *Strickland* v. *Strickland*, 10 Sim. 374), will descend to his heir-at-law, while Whiteacre, which came to him by descent, will descend not to his heir, but to the heir of A., who may, of course, be a different person. Notwithstanding this rule, on the death intestate of a coparcener, the heir to be sought is not the heir of the ancestor from whom the coparcener inherited, but the heir of the coparcener. (*Cooper* v. *France*, 19 L. J. Ch. 313.) Thus, if a coparcener dies leaving a son and a sister, daughter of the ancestor from whom the deceased coparcener inherited, if descent were traced from the ancestor as first purchaser, the deceased's share would go equally between her son and her sister. But in fact it goes entirely to the son. (*Ibid.*) And the same rule applies in all cases. (*In re Matson. James* v. *Dickinson*, (1897) 2 Ch. 509.) In such cases the old rule applies, and the descent is traced, not from the last purchaser, but from the last person seised of the land.

A limitation is placed on this rule by sects. 19 and 20 of the Law of Property Amendment Act, 1859. Where there is a failure of the heirs of the last purchaser, then descent may be traced from the person last entitled to the land. Thus, if A. dies intestate, leaving freeholds descended to him from his father, and his father had left no blood relations save A., then, in order to prevent escheat the freeholds would descend to A.'s heirs, if he had any—that is, his relatives by his mother's side.

(b) Heritable freeholds: *The inheritance descends in the first place to the issue of the last purchaser* in infinitum.

Personalty: *The succession falls in the first place among the issue of the intestate* in infinitum.

It should be repeated here that these rules apply subject to the widow's or widower's rights, which we have already stated. (*Supra, p.* 316.) Thus, in the case of freeholds, if the intestate left a widow or widower, the issue would take subject to the widow's right to dower, or the widower's right to an estate by the curtesy; and in the case of personalty, the widow would be entitled to her third and the widower to the whole estate, to the total exclusion of the issue. Subject to this, in both heritable freeholds and personalty it is only in default of issue of the stock of descent or succession that lineal ancestors or collateral relatives have any claim.

(c) Heritable freeholds: *In default of the issue of the last purchaser the inheritance descends to his nearest lineal ancestor.*

Personalty: *In default of the issue of the intestate the succession falls in the first place to his father.*

The rule here applicable to heritable freeholds is a new one introduced by sect. 6 of the Inheritance Act, 1833. The old rule was that freeholds could not lineally ascend, and, therefore, they frequently went to a collateral relative in preference to a lineal ancestor nearer in kin to the propositus.

The new rule means that a lineal ancestor will now take in preference to any collateral relative who, under the old rule, could only have taken by tracing his descent through the ancestor, or in default of descendants of the ancestor. Thus the father is preferred to the brother, the grandfather to the uncle, but not to the brother, since the brother can take by tracing his descent through a nearer lineal ancestor, *i.e.*, the father.

In the case of personalty the entire succession goes only as far as the father. Should he be dead, then the mother and brothers and sisters become entitled in equal shares.

(d) Heritable freeholds: *The male relatives of the last purchaser are preferred to his female relatives of the same degree.*

Personalty: *No preference to male relatives over female relatives is shown except as regards the intestate's parents.*

The rule of inheritance which gives preference to the male over the female applies not merely to the issue of the propositus, but also to his lineal ancestors and collateral relatives. Thus, a son succeeds before an elder daughter: the son of a son before the son of a daughter; the father and all his relatives succeed before the mother or any of her relatives; the father's or mother's paternal relatives before the father's or mother's maternal relatives, &c. (Sect. 7, Inheritance Act, 1833.)

The female as compared with the male relatives are placed at no such disadvantage in respect to claims to an intestate's personalty save as regards the intestate's mother. If the intestate has left no issue, as has been just pointed out, the father is entitled to his whole personalty though the intestate's mother be living; if the father be dead the mother, who is then the only relative in the first degree, ranks only with the brothers and sisters of the intestate who are in the second degree of kinship to him.

(e) Heritable freeholds: *As between male relatives of the same degree only the eldest inherits; while all female relatives of the same degree inherit equally.*

Personalty: *All relatives of the same degree succeed equally independently of age or sex, subject to their bringing into hotchpot any advancement they may have received* *from the intestate before his death.* (Statute of Distributions, 1670, s. 5.)

The custom of primogeniture, as the preference of the eldest in the matter of inheritance is usually called, probably arose out of the feudal system. A characteristic of that system was the identification of the ownership of land with political and military power. This cannot easily be divided among a number of persons, and accordingly the land to which it was annexed was not divided either as a rule. When, however, the descent was to women, who in theory and law were incapable of exercising political and military power, the reason for preventing the division of the land disappeared, and they succeeded equally as coparceners.

Before the introduction of the feudal system, the descent appears to have gone to the males equally, as is now the case in gavelkind lands. (Glan. l. 7, c. 3.) Indeed, descent to the eldest son was at first, even after the Conquest, confined to lands in knight service. (2 Bl. Com. 215.) The course of descent in gavelkind lands is, to all the sons equally, in default of sons to all the daughters equally, in default of daughters to all the brothers equally. If a son or daughter is dead leaving issue the issue take their parent's share. (Rob. Gav. 112, 115.)

The doctrine of hotchpot is now confined to the succession to personalty. Originally, however, it applied also to realty. If land was given by an ancestor to a woman in frankmarriage, and afterwards land descended from the same ancestor to her in coparcenary with her sisters, before she could claim a share of the inheritance she had to bring into the division the lands in frankmarriage. (2 Bl. Com. 191.) At present in distributing the personalty of an intestate, land coming to one of the claimants as heir cannot be taken into consideration. (*Boyd* v. *Boyd*, L. R. 4 Eq. 305.) Nothing need be brought into the estate of the intestate, by the claimants to a share of it, but personalty given by the intestate for their advancement or establishment in life—not merely their support or education. (*Taylor* v. *Taylor*, L. R. 20 Eq. 155.)

(f) Heritable freeholds: *Representation by issue is unlimited.*

Personalty: *Representation by issue is unlimited only as regards the descendants of the intestate, not being admitted at all in the case of his collateral relatives, save only as respects the representation of his deceased brothers and sisters by their children where one or more brothers or sisters are surviving.*

"Representation by issue" means that the issue of a deceased person who, were he alive, would be entitled under the intestacy, are permitted to stand in his shoes for the purpose of succession. Thus, if A. dies intestate, leaving B. and C., two daughters, and D., the child of a deceased son, D. will represent his or her dead father, and be entitled to succeed to A.'s realty in preference to B. and C., A.'s daughters. The same would have been the case if B. and C. had been aunts of A.'s, and D. had been the child of a deceased uncle. As to personalty, this principle is recognized fully in the case of descendants of the intestate. Thus, in the case given, A.'s personalty would be divided between B., C., and D., the last mentioned taking his father's share by representation. And the same would be the case if B. and C. had been sisters of the intestate, and D. the son of a deceased brother. But had B. and C. been aunts, and D. the son of a deceased uncle or aunt, B. and C. would have taken everything, and D. nothing. After the children of brothers and sisters of the intestate no representation is permitted among collaterals. All relatives of the nearest degree to the intestate take the whole net personalty among them to the exclusion of all other relatives of a more remote degree.

Relatives taking directly take *per capita*, that is, the estate is divided among them by the head, while relatives taking by representation take *per stirpes*, that is, the parent's share is divided among those who represent him. Thus, if A. dies intestate leaving five children as next of kin, these children take equally *per capita*. If, however, one child had predeceased him, leaving five children, the four children of A. would each have taken a fifth part of A.'s personalty, while the five grandchildren would have taken the remaining fifth part—their parent's share—between them.

Representation does not arise among collaterals where all entitled are of the same degree, and, accordingly, in such case each takes *per capita*. Thus, if A. dies intestate leaving no brother living, but five nephews by one deceased brother, and one nephew by another, the six nephews will each take one sixth part of his personalty. (*Lloyd* v. *Tench*, 2 Ves. sen. 215.)

But this rule does not apply to descendants. If in the last case the next of kin instead of being nephews had been children of two sons of A., the estate would have been divided into moieties, one going to the five children of the one son, and the other to the only child of the other son. (*In re Natt, Walker* v. *Gammage*, 37 Ch. D. 517.)

(g) Heritable freehold: *Relatives of the half-blood inherit after relatives of the whole blood, where the common ancestor is a male, and after the common ancestor where the common ancestor is a female.*

Personalty: *No distinction subsists between the half and the whole blood as to their right to succeed.*

The right of the half-blood to inherit was given by sect. 9 of the Inheritance Act, 1833. Before that they were totally excluded. This exclusion, like the preference of the male relatives over the female, probably originated in the ancient custom of regarding as the only legitimate relationship that through males—agnatic relationship. (Maine's Ancient Law, pp. 150—152.)

Another rule of descent applies to heritable freeholds which can have no analogy applicable to succession to personalty. This is as follows:—

In inheritance by female paternal ancestors, the mother of the more remote male paternal ancestor and her descendants shall be preferred to the mother of a less remote paternal ancestor and her descendants; and in inheritance by the female maternal ancestors, the mother of the more remote male maternal ancestor and her heirs shall be preferred to the mother of a less remote male ancestor and her heirs. (Inheritance Act, 1833, s. 8.)

This rule is not of frequent application. It means, for example, that if A. dies intestate, leaving no relatives of his father's blood except his father's mother and his father's father's mother, the latter will succeed to A.'s freeholds in preference to the former. In the same way, if A. had had no relatives of his father's blood, and none of his mother's blood except her father's mother and her father's father's mother, the latter would succeed in preference to the former.

The right of the Crown to an intestate's estate arises in the case of personalty only when the intestate leaves no next of kin: the Crown is then entitled to claim his goods as *bona vacantia*. As regards realty, it arises only when there are no heirs. If the intestate was the first purchaser, then the heirs to be sought are merely his own blood relations. If the intestate was not the first purchaser, then the heirs primarily to be sought are not his heirs but the heirs of the first purchaser. If, however, the first purchaser has left no heirs, then the heirs of the intestate may inherit, and it is only on their failure also, that the Crown can claim by escheat. (Inheritance Act, 1859, s. 18.) The Crown's right of escheat arises when the land is held direct from the Crown; when it is held from a mesne lord—such as the lord of a manor—the escheat is to the mesne lord; but all freehold land is presumed to be held from the Crown till the contrary is shown. The same rule now applies to equitable fee simples. It is to be remembered that the Crown takes subject to a surviving widow's or widower's rights.

Part V.

RIGHTS OVER THINGS OWNED BY OTHERS.

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Corporeal and Incorporeal Property.—We have now dealt with the law of property strictly so called, that is, ownership over existing physical objects; but there still remain those proprietary rights which, though not ownership in its fullest or strictest sense, are nevertheless commonly regarded as property. These rights are of two kinds. The first class consists of true proprietary rights vested in one person over physical objects owned by another person, or, in other words, some of the ordinary rights which together constitute the ownership of a thing, detached from the bulk of those rights and vested in a different person from him who is entitled to the bulk of them. (*See supra, p.* 14.) The second class consists of those quasi-proprietary rights which, since they do not subsist over physical objects, are not, strictly speaking, proprietary at all.

These two classes of rights are now commonly called purely incorporeal things. This name, as we have already pointed out, arises from a confusion between rights and the objects over which rights subsist, namely, physical objects or things. The reason, however, why they are so called is clear. They are called incorporeal because they do not give a right to the possession and control of a physical object. And they are called purely incorporeal, to distinguish them from interests in expectancy in freehold land which were in old times usually classed as incorporeal property, because they did not entitle their owner to the immediate possession of the land, and therefore, like purely incorporeal property, they lay in grant and not in livery.

We will now deal shortly with the first class—rights over things owned by others.

SECTION I.

RIGHTS OVER LAND OWNED BY OTHERS.

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Mode of Owning.—When rights over land owned by others are annexed to the ownership of other land, they are said to be *appendant* or *appurtenant* to such land. When they are owned separately from the ownership of any land, they are said to be in *gross*. A right of this kind is appendant when it was naturally and originally annexed to the ownership of the land; it is appurtenant when it has become annexed to it through express grant or prescription. Rights appendant or appurtenant pass under a grant of the land to which they are annexed without special mention; but it sometimes happens that such rights, though enjoyed with a plot of land, are not, strictly speaking, either appendant or appurtenant to it, and in such cases they do not, at common law, pass with the grant of it, unless specially described. Accordingly it used to be customary to insert in deeds of grant general words, as they were called, to carry any easements annexed to the land. Now, by sect. 6 of the Conveyancing Act, 1881, such general words are to be implied, save where a contrary intention is expressed, in all conveyances executed after 1881.

Rights in land owned by others, when enjoyed in gross, are tenements within the statute *De Donis*, and therefore entailable.

A. **Rights to use Land in Definite Ways.**—Rights to use in definite ways land belonging to another person than the person entitled to the rights are called, in legal language, *easements*.[1] Easements are not regarded in English law as property in themselves. Owing to the fact that they never exist in gross, that is, separately, but are always annexed to the ownership of some plot of land other than that over which they subsist, they are regarded rather as extensions of the ordinary rights of ownership in the plot of land to which they are annexed.[2] This plot is called the *dominant* tenement; the plot over which they subsist the *servient* tenement.

Easements should be distinguished from those common law rights which are sometimes called natural easements, such as the right which the owner of one plot of land enjoys to have his soil supported by the soil of the neighbouring plot, the right which the owner of the surface of land enjoys to have it supported by the minerals or other strata underlying it when these belong to another person, or the right which one riparian owner enjoys to the continuance, undiminished and uncontaminated, of the natural flow of a river or stream passing over or by his land. (*John White & Sons* v. *J. & M. White*, (1906) A. C. 72; *Mayor of Bradford* v. *Pickles*, (1895) A. C. 129. For the use a riparian owner may make of water flowing over his land, *see per* Lord Macnaghten, *McCartney* v. *Londonderry Rail. Co.*, (1904) A. C. 301, at p. 306.) These are mere incidents of ownership. If in any case they do not accompany ownership, they must have been parted with by express grant, or have been lost by negligence or acquiescence in their violation. Easements, on the other hand, are always additions to the ordinary rights of ownership which have to be acquired just as ordinary rights are lost—by grant, express or implied, or prescription. (*Backhouse* v. *Bonomi*, 9 H. L. Cases, 503.)

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[1] Easements are usually regarded as definitely restricted by positive law, but this is not quite accurate. As Lord St. Leonards said in *Dyce* v. *Hay*, 1 Macq. 305, "The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind." (*And see* as an example, *Attorney-General of South Nigeria* v. *John Hall*, (1915) A. C. 599.) The proper mode of stating the law with regard to them is that their extent cannot be—like negative covenants in equity—settled by agreement between the parties.

[2] It is perhaps worth noting that Blackstone puts rights of way among incorporeal hereditaments, though such rights can scarcely be said ever to exist in gross. (2 Bl. Com. 35. *But see* *Rymer* v. *McIlroy*, (1897) 1 Ch. 538.)

The most important easements are rights of support for buildings, rights of way, and rights to water, light, or air. By a right of support for buildings is meant a right to have buildings on the dominant tenement supported by the soil, or the buildings on the soil, of the servient tenement; or where the surface and subjacent strata belong to different owners, to have the buildings on the surface supported by the subjacent strata. By a right of way is meant a right belonging to the owner of the dominant tenement to walk, ride, drive, or bring cattle—as the case may be—over the servient tenement. By a right to water is meant either a right to have an artificial flow of water from the servient tenement continued, or a right to discharge over the servient tenement water which has been artificially accumulated on the dominant tenement. By rights to light and rights to air are meant rights to the free passage of light or air over the servient tenement to windows or apertures in buildings on the dominant tenement.

None of these rights necessarily attaches to the ownership of a plot of land at common law. They must be specially acquired, and they may be acquired in any of three ways: (a) by express grant; (b) by implied grant; (c) under the Prescription Act, 1832.

Of express grant it is unnecessary to say anything, save that it must be by deed. Implied grant may arise either (a) through the circumstances attending the grant of the dominant tenement, or (b) through long enjoyment of the easement by the owner of the dominant tenement. As to the former of these, it is a rule that a grantor shall not be allowed to derogate from his own grant. Accordingly, when the owner of land grants part of it, he will not be allowed to use the remainder in such a way as to interfere with the enjoyment of the part granted. Thus, if the part granted can only be entered upon over the part retained by the grantor, the grantee will have a right of way over the part retained. This is called a way of necessity. Again, if the part granted discharges artificially water over the part retained, or receives an artificial supply of water from it, or if the buildings on the part granted receive light or air from over the part retained, all these rights will go with the grant of the part granted without special mention—that is, the grant of them will be implied. The easements that at common law go with such a grant are called *continuous and apparent easements*, because they are easements which constantly operate without the intervention of man. Discontinuous easements—such as rights of way—did not, as a rule, go with such grants unless specially mentioned, or unless arising through necessity. *But see now* sect. 6, Conveyancing Act, 1881. (Under. & Stra. on Wills, pp. 125 *et seq.*)

Long enjoyment, again, if it is *nec vi, nec clam* and *nec precario* (*see Schwann* v. *Cotton*, (1916) 2 Ch. 459), implies a grant. According to the common law, if an easement were enjoyed from time "whereof the memory of man runneth not to the contrary," that enjoyment was presumed to have had a legal origin. By analogy to the period established by 3 Ed. I. c. 39—commonly called the *Statute of Westminster I.*—for writs of right, the period of legal memory was fixed as being from the first day of the reign of Richard I. This, again, was qualified by the rules of evidence as to proof of enjoyment established by the Courts. Under these, if uninterrupted and unexplained enjoyment of the easement for twenty years before action brought could be shown, that was evidence from which a jury might infer that the enjoyment originated in a grant which had been lost, or in some other lawful way. This, however, might be defeated by showing that, as a matter of fact, the enjoyment did begin since the reign of Richard I., and that it did not originate in a grant or in other lawful manner. Such was the state of the law when the Prescription Act, 1832, was passed, and in cases where advantage of the Act cannot be taken, it is the law which regulates the acquisition of easements still. Thus a right to air is not an easement within the Act, and accordingly, to acquire it by long enjoyment, recourse must be had to the old common law rule as to a lost grant (*Bass* v. *Gregory*, 25 Q. B. D. 481; *Hall* v. *The Lichfield Brewery Company*, 49 L. J. Ch. 655); and the same is the case as to rights of support for buildings from the soil of the servient tenement (*Angus* v. *Dalton*, L. R. 6 App. Cas. 740), or from buildings upon it (*Lemaitre* v. *Davis*, 19 Ch. D. 281).[1] As to the person against whom an action lies for interference with such right of support, *see Greenwell* v. *The Low Beechburn Colliery Company*, 76 L. T. 759.

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[1] In *Angus* v. *Dalton*, Lord Selborne, C., expresses an opinion that rights to support for buildings are easements within sect. 2 of the Prescription Act. The words "other easement" in that section have, however, been usually interpreted as applying only to easements of the same kind as rights of way, and Lord Selborne's view was not adopted by any of the other judges (save, to a certain extent, by Lindley, J.) who delivered judgments and opinions in that great case which is now the leading authority

Under the Prescription Act, an indefeasible title to a right to light may now be acquired by an enjoyment for twenty years without interruption immediately before action brought, unless such enjoyment has been with the consent in writing of the owner of the servient tenement. (Sect. 3; *Colls* v. *Home and Colonial Stores, Ltd.*, (1904) A. C. 179.) An indefeasible title to a right of way, or of water or other easement, can be acquired by an enjoyment for forty years without interruption, unless such enjoyment is by consent or agreement; while a title, which cannot be defeated merely by showing that the enjoyment began prior to that period, can be acquired by twenty years' enjoyment. (Sect. 2.) No break in such enjoyment for a lesser time than a year after notice is to be an interruption within the Act. (Sect. 4; *and see Flight* v. *Thomas*, 11 A. & E. 688; *and cf. Lord Battersea* v. *Com. of Sewers for City of London*, (1895) 2 Ch. 708.)

B. **Rights to take part of Land's Profits.**—Rights to take part of the profits or produce of land belonging to another person are of four kinds: (a) *Seignories;* (b) *Profits à prendre;* (c) *Rents and annuities charged on land;* (d) *Tithes.* A very short notice of each of these will be sufficient for our purpose.

Seignory.—As we have seen, before the statute *Quia Emptores* the relation of landlord and tenant could subsist between the grantor and grantee of land in fee simple. When such a relation subsisted the grantor was entitled to homage, fealty, and such services as were reserved in the grant, from the tenant. He had not, however, any estate in the land, but merely a possibility of reverter in case the

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on prescription of easements. (*But see* dictum of Lord Davey, *Simpson* v. *Godmanchester Corporation*, (1897) A. C. 696, at p. 709.)

tenant's interest escheated. These rights of the grantor or lord constituted a *seignory* or *lordship*.

Since the statute *Quia Emptores* it is impossible, in England, to create, except by royal charter, the relation of landlord and tenant between the grantor and grantee of land in fee simple. Accordingly, probably all seignories now existing originated before the date of that statute. They are now found usually connected with manors in which are lands of copyhold tenure. In such cases the grant of the manor carries with it, without express mention, the seignory over the fee tenancies of the manor, the seignory being here strictly appendant to the manor. Sometimes, however, seignories exist in gross.

Profits à prendre.—Profits à prendre are rights to take part of the natural produce of land, of which the ownership is vested in another. The most important kinds are what are called rights of common. These are of four kinds: (a) *common of pasture*, or the right to graze cattle on another's land; (b) *common of piscary*, or the right to fish in another's waters; (c) *common of turbary*, or the right to dig turf for firebote—for the fires in the house to which the right is annexed; (d) *common of estovers*, or the right to take estovers.

Commons of all kinds seem to have arisen out of the organization of the old village community. When a tract of land was occupied by a community, the better part of the land was portioned out among the families composing the community, while the remainder was the common land of all, to be used by them for pasturing their cattle, and for providing them with turf and wood. This common land was called the waste of the manor. Gradually, however, as the chief of the community or lord of the manor became more and more important, the waste ceased to be regarded as the common land of the manor, that is, the joint property of the freeholders of the manor, and began to be considered the freehold of the lord, over which the freeholders had merely certain rights of common for their cattle, and sometimes also rights to cut turbary, to take estovers, and to fish. (Maine's Village Communities in the East and West, p. 135.)

Of the various kinds of common, common of pasture is incomparably the most important. It may be either appendant or appurtenant to a freehold of a manor, or it may be held in gross. It is appendant when it arises of common right. (2 Bl. Com. 32.) It then is annexed to arable land only, and subsists over the waste of the manor in which the land lies. In such case, the right is to depasture such animals as are necessary for the land, such as horses and oxen to plough it, and cows and sheep to manure it; and the number of cattle which may be depastured when it is not definitely fixed is confined to the number the land, to which the right is annexed, can support during winter, the number *levant* and *couchant* on the land as this is called. It is appurtenant when it arises by prescription or grant, and is claimable for land in a different manor, or for land not arable, or for beasts not necessary for the proper cultivation of the soil, as goats or swine. It is in gross when the right is not annexed to the ownership of land either in the manor or out of it. In common of pasture in gross the number of cattle which may be depastured is usually fixed, but it may be those *levant* and *couchant* on a certain farm. When the former, the right may be claimed by prescription or grant; when the latter, it must be claimed under an express grant.[1]

Another kind of common of pasture is common because of vicinage. It consists of the right which the owners of separate strips of unenclosed land have of turning their cattle to depasture over the whole tract.

Rights of common, whether appendant or appurtenant, pass with a grant of the land to which they are annexed without special mention in the grant. (Sect. 6, Conveyancing Act, 1881.)

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[1] Copyholders often enjoy rights of common over the waste of the manor of which they are parcel. Unlike freeholders, however, they are not entitled to them by general custom of the realm, but by special custom of the manor.

Rights of common may be put an end to either by the enclosure—or *approvement*—of the waste over which they subsist, or by *extinguishment*. Under the Statute of Merton (20 Hen. III. c. 4), the lord of the manor was given power to approve the waste, provided he left unenclosed sufficient to satisfy the commoners' right. Now, enclosure usually takes place under the Inclosure Acts (8 & 9 Vict. c. 118; 39 & 40 Vict. c. 56; and 45 Vict. c. 15, s. 2), with the sanction of the Board of Agriculture. (Settled Land Act, 1882; Board of Agriculture Act, 1889; *and see* Law of Commons Amendment Act, 1893.) Extinguishment may arise from release—a release of part of the common land extinguished the right over the remainder—and unity of possession of land to which the right is annexed and the land subject to the right of common.

There are some other *profits à prendre* which may simply be mentioned. Of these, a several fishery is the best known. It consists in the exclusive right to take fish in a navigable river, the bed of which belongs to the owner of the fishery.[1] Such a right may be granted to a person having no property in the river bed. (*Fitzgerald* v. *Firbank*, (1897) 2 Ch. 96.) But the existence of a several fishery raises a presumption that the bed of the river belongs to the owner of the several fishery. (*Ecroyd* v. *Coulthard*, (1897) 2 Ch. 554.) Grants of a right to enter upon the land and take the minerals may also be considered grants of *profits à prendre*.

Franchises.—Closely akin to *profits à prendre* are franchises which savour of the land. A franchise or liberty is "a regal privilege in the hands of a subject."

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[1] The owner of a salmon fishery in the upper reaches of a river has the right to prevent riparian owners on the lower reaches erecting obstructions which may prevent the fish coming up the river. (*Pirie* v. *Kintore* (*Earl*), (1906) A. C. 478. *And see Lord Fitzhardinge* v. *Purcell*, (1908) 2 Ch. 139, as to rights over foreshore of navigable river.)

(2 Bl. Com. 153.) It can only originate in a grant by the Crown, and when it savours of the land it consists of a right to do something upon, or take something from, land which may or may not belong to another. The more usual franchises are *free fishery*, or the exclusive right to fish in a public river, *free warren*, or the exclusive right to kill and take beasts and fowls of warren on another person's land, that is, hares, conies, pheasants and partridges, rights to tolls, to treasure trove, to wrecks, and other prerogative rights of a similar kind. There are other and more common franchises which do not savour of the land. These will be referred to in Part VI.

Rents and Annuities charged on Land.—A rent or an annuity charged on land is a right to share in the profits of land belonging to another. Such rents or annuities are, when charged on freehold land,[1] incorporeal hereditaments, and can be held in the same estates as the land itself. They may be created without formal words, and either at common law or under the Statute of Uses. Before, however, they can affect the land on which they are charged, they must be registered, unless they arise under marriage settlements (18 Vict. c. 15, s. 12), or by will. (Sect. 14.) This statute applies only to annuities for life or lives, or for terms of years or greater estates determinable with life. An unregistered grant is good against subsequent volunteers with or without notice; but it is not good against subsequent purchasers for value, save where these had notice of the charge. (*Greaves* v. *Tofield*, 14 Ch. D. 563.)

In the preceding parts of this work, the remedies for rents and annuities charged on land and their incidents generally have been pointed out. It is sufficient to add here two further points. In the first place, at common law there was no escheat on the death without a will and without heirs of the owner of a rent-charge in fee simple. The rent sank into the land, or was extinguished for the benefit of the owner thereof. Now, under the Intestates' Estates Act, 1884, s. 4, apparently there is an escheat of a rent-charge, but whether for the benefit of the mesne lord—where the land subject to it is held of a mesne lord—or of the Crown is not very clear. In the second place, sect. 28 of the Wills Act (1 Vict. c. 26), which passes the fee in realty devised without the necessity of words of limitation in the will, applies only to realty existing at the death of the testator. Accordingly, if an existing rent-charge or annuity in fee is devised, the fee will pass without words of inheritance being used in the will; but if the will creates a new rent-charge or annuity, that will be only a charge or annuity for the life of the devisee unless a different intention appears in the will. (*Nichols* v. *Hawkes*, 10 Hare, 342.)

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[1] Rent issuing out of a leasehold interest is a chattel real. (*Re Fraser, Lowther* v. *Fraser*, (1904) 1 Ch. 111.)

Tithes.—Tithes consist of the right to a tenth part of the profits of the land, whether these profits arise from the natural growth on the land, or the stock upon it, or the labour bestowed upon it. Formerly they were payable in kind, but now a multitude of Acts of Parliament have brought about their commutation into a rent-charge which varies in amount according to the price of corn. Formerly, too, they were usually paid by the tenant in possession of the land; but now, by the Tithe Act, 1891, they are made payable in all cases by the owner, and any contract between the owner and the tenant under which the latter is to pay them is made void.

Tithes being originally an endowment for the support of the church, when they belong to the rector of the parish they are his by common right. A vicar when entitled to them, takes them by gift or by prescription. Occasionally, before the Reformation, they became the property of monasteries. But until the dissolution of the monasteries they seem to have been exclusively in ecclesiastical hands. On the Reformation, however, those belonging to the dissolved monasteries were confiscated to the Crown. The Acts of Parliament confiscating them gave the king power to grant them by letters patent to lay persons (called *lay impropriators*). (27 Hen. VIII. c. 28, s. 2, and 31 Hen. VIII. c. 13, ss. 18 and 19.)

Tithes in lay hands are incorporeal hereditaments held in the same estates as subsist in freehold land, and transferable by the same modes as estates in freehold land. (32 Hen. VIII. c. 7, s. 7.) They descend like freehold estates, with this difference, that they are not subject to any local custom of descent which affects the land out of which they issue. This arises from their being regarded as an inheritance altogether distinct from the land. From this view two other consequences follow. When the land and the tithes issuing out of it belong to the same person, there is no merger at common law, though there may now be merger under statute. And, in the same circumstances, the tithes do not go with a grant of the land, unless they are specifically mentioned in the conveyance.

When tithes belong to the rector or vicar of the parish, he owns them as a corporation sole. (*See p.* 357.) He personally is entitled to the benefit of them for his life. On his death the title to them is in abeyance until a new rector or vicar is inducted into the profits of the living. The new rector or vicar's title then reverts back to the death of his predecessor.

C. **Right to, or to appoint to, Office connected with Land.**—The most important right to, or to appoint to, an office which entitles the office-holder to a part of the profits of, or to an interest in, land, is what is called an *advowson*.

Advowsons.—An advowson is the perpetual right to present to an ecclesiastical benefice. The owner of the right is called the patron of the benefice. Advowsons are either *donative*—*i.e.*, where the patron is either the Crown, or a private person specially licensed by the Crown, and where the patron appoints by deed without the intervention of the bishop in whose diocese the benefice is; or *collative*, *i.e.*, where the patron is the bishop himself; or *presentative*, *i.e.*, where the right consists in the right to present a proper person to the bishop who is bound to *institute* such person into the office of the cure of souls and to *induct* him into the profits of the office.

An advowson presentative, when owned not in virtue of a spiritual dignity or office, is an incorporeal hereditament, and may be enjoyed either in gross, or as appendant to a manor. It may be held for estates like freehold land; and it is subject to the patron's widow's right to dower, which right takes the form of the widow having the right to the third presentation. It is alienable by deed, and is assets for the payment of the debts of the patron. (Co. Litt. 374 b.)

Sometimes the right of presentation has to be exercised by the patron on the nomination of another person. Thus, when the advowson is the subject of a trust, the trustee holds the right of presentation, but the right of nomination is in the *cestui que trust*; and when it is the subject of a mortgage, the mortgagee presents, but the mortgagor nominates. Sometimes, again, the right to present upon the next vacancy is separated by sale or assignment from the advowson. In such a case, this right of next presentation is a chattel real, and on the death of the owner goes to his executors. The right of next presentation cannot be sold during a vacancy, such an alienation constituting the offence of *simony* (31 Eliz. c. 6; 28 & 29 Vict. c. 122, ss. 2, 5, 9); and on the sale of the advowson itself during a vacancy, the right remains in the vendor. No clergyman, however, can sell or assign any patronage which he holds by virtue of his dignity or spiritual office. (3 & 4 Vict. c. 113, s. 42.) Nor can a clergyman buy the next presentation for his own preferment, even when the church is full, though he may purchase the advowson itself. (12 Anne, st. 2, c. 12, s. 2.) And by 11 Geo. III. c. 17, s. 5, a grant of an advowson or of a presentation by a Papist patron is void except when it is to a Protestant for valuable consideration and for the Protestant's benefit, while a devise of an advowson by a Papist is void if it be for the benefit of the heirs or family of the Papist owner.

When the advowson is held in joint tenancy or tenancy in common, all the tenants must concur in the presentation. If they cannot agree upon a clerk, and each presents one on his own account, the bishop may induct either or refuse to induct either. In the latter case, unless a joint presentation is made within six months, the right to present lapses. (2 Bl. Com. 182.) When it is held in coparcenary all the coparceners should concur in the presentation, but in case of disagreement, the eldest coparcener or her husband or grantee is entitled to the first presentation, the next to the second, and so on in order of age. By sect. 2 of 7 Anne, c. 18, on the partition of an advowson held in joint tenancy or tenancy in common, the rule applicable to disagreeing coparceners applies to the former joint tenants or tenants in common.

By sect. 4 of the Statute of Frauds, 1677, all presentations must be in writing. Usually, they are made by means of an ordinary letter to the bishop, and in every case they may be revoked by the patron at any time before actual presentation.

Ancient Offices.—There are some ancient offices connected with land, such as stewardships of manors and rangerships of forests, which are incorporeal hereditaments. (4 Inst. 87.) Such offices are, however, not of sufficient importance to be considered in an elementary work.

Titles of Honour.—Like ancient offices, titles of honour arose originally out of duties connected with the land, and, as a rule, they still savour of it and are tenements. (Co. Litt. 2 a.) Like franchises, they can only arise by grant from the Crown; they may be created either by letters patent or by writ. The former is now the usual mode of creation. If created by letters patent, they must be limited to the grantee and his heirs; if by writ, they are hereditary, without mention of the grantee's heirs. (2 Bl. Com. 118.)

When a title of honour savours of the land, and is limited by patent, it is a tenement and may be held in fee simple, fee tail, or special tail. When it descends to females it is not held in coparcenary, but falls into abeyance till one heir alone is entitled, or until the sovereign revives the title in favour of one of the coparceners or her heir. (2 Bl. Com. 215.)

SECTION II.

RIGHTS OVER GOODS OWNED BY OTHERS.

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Ownership and Possession.—Rights over goods arising out of contracts with the owner of the goods are not regarded at common law as giving those entitled to them any share in the ownership of the goods over which they subsist. These rights are regarded as affecting not the ownership, but merely the possession of the goods. Such rights, however, when they are enforceable against the goods themselves, without the consent of the owner, are part of the right of ownership over the goods, much as a lease for a time certain is now part of the ownership of land. When they are not so enforceable, they can scarcely be considered part of the ownership, but merely as a licence to hold or use the goods at the will of the real owner, akin in their nature to the licences to go upon land.

Rights over goods owned by others, whether enforceable against the will of the owner or not, are divisible into three classes—rights by *trover*, by *bailment*, or by *lien*.

Trover.—Trover is from the French verb *trouver*, to find. When a person finds goods which have been lost, he is entitled, as we have seen, to hold them against everybody except their rightful owner (*Armory* v. *Delamirie*, *supra*, *p*. 306), whose property in them is unaffected by the loss of their possession. (The same is the case where the person obtains possession in any other lawful way. *See infra*, *p*. 345.) If the finder, or other person in possession, refuses on demand to deliver them to the rightful owner, the latter can recover them by action. This action was formerly called an action of *trover and conversion*, or more shortly, of trover. The conversion—that is, the determination to convert the goods to the finder's own use as evidenced by his refusal to deliver them up—was the gist of the action, and, accordingly, it came to lie for all unlawful detaining of goods, whether the detained possession originated in finding or not.[1] Forms of action have now been abolished under the Supreme Court of Judicature Act, 1875, but the principle upon which relief is given remains unaffected.

Bailment.—When goods are delivered by their owner to another person, who takes possession of them subject to a condition to return them as soon as the purpose, or the period for which they were delivered, is fulfilled or determined, the transaction is called a *bailment* of the goods. The owner is then the *bailor* of the goods, the person to whom they are delivered the *bailee*.

Bailments may be divided according as the bailment is for the benefit of the bailor alone, or for the benefit of the bailee alone, or for their common advantage. Bailments of the first class are: *depositum*, or *simple bailment*, where the thing is kept by the bailee for the use of the bailor, and *mandatum*, where the thing is to be carried or dealt with in some way by the bailee. In both *depositum* and

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[1] *See* Maitland's Equity, p. 365.

mandatum the bailee receives no payment for his trouble, and in both cases he is responsible for injuries to or loss of the thing only when such injuries or loss are due to gross negligence on his part. Bailments of the second class are of one kind only—*commodatum*, or loan, where the thing delivered is of a useful nature, and the bailor gives the bailee permission to use it without receiving payment for doing so. Here the bailee is responsible for injuries and loss due to slight negligence on his part. The last class consists of *locatio rei*, where the bailee hires the thing; *vadium*, or pledge, where the thing is delivered as a security for a debt due by the bailor to the bailee; and *locatio operis faciendi*, where the thing is delivered to be carried or otherwise dealt with by the bailee for payment. In all these cases, in the absence of express agreement on the point, the bailee is liable for injuries and loss arising from ordinary negligence of himself or his servants, that is, a less degree of care than an ordinary owner shows in respect to his own goods. (*Coggs* v. *Barnard*, 2 Ld. Raym. 909; 1 Sm. L. C.; *Coupé Co.* v. *Maddick*, (1891) 2 Q.B. 413.)

It is unnecessary to enter here at any length into the other incidents attached by the general law to the different kinds of bailments. One or two points may, however, be referred to. In *depositum*, when the bailee is an innkeeper, and the things deposited are the luggage of guests using his inn; and in *locatio operis faciendi*, when the bailee is a common carrier, and the goods bailed are goods delivered to him to be carried for hire, the bailee is liable for all injury and loss happening to them while they are in his inn or in his custody, save injury or loss arising through natural decay of the goods themselves, or through the act of God, or of the King's enemies. (As to innkeepers, *see Calye's Case*, 8 Coke, 32; 1 Sm. L. C.; as to common carriers, *Dale* v. *Hall*, 1 Wils. 281.) In the case of both innkeepers and common carriers, their common law liability has, however, been modified by statute.

(Innkeepers' Liability Act, 1863; Carriers Act, 1830; Railway and Canal Traffic Act, 1854; as extended and amended by 26 & 27 Vict. c. 92 and 36 & 37 Vict. c. 48.)

In every class of bailment, the bailee, if deprived by the act of a wrongdoer of the possession of the goods, can recover it by an action of trover. (*Sutton* v. ***Buck***, 2 Taunt. 302.) The bailor has the same right in every kind of bailment save those which entitle the bailee to exclude him from the possession of the goods, when the right of recovery is in the bailee exclusively. The reason of this rule is that the law merely decides who is entitled to the possession of goods; it never decides who owns them. The bailee, as the person legally in possession, is always entitled to possession of the goods as against a wrongdoer. (*Armory* v. *Delamirie*, *supra*.) The bailor as owner is also entitled to it, except where by agreement the bailee has the exclusive right to it. The classes of bailments where the bailee has that exclusive right irrespective of special agreement are pledges and hiring agreements.

Liens. Liens are of two kinds, *common law* and *equitable*. A common law lien is merely the right to retain the possession of goods belonging to another person until a particular debt, or the balance of a running account, is paid by the owner of the goods. An equitable lien is the right in equity to have a particular claim satisfied out of particular property belonging in law to another person.

Equitable liens do not depend upon the creditor retaining possession of the property; they bind it in the hands of any person who obtains possession of it with notice of the lien. The most important of these are vendors' and purchasers' liens. It has lately been decided that these liens arise with respect to personalty as well as realty. (*In re Stucley, Stucley* v. *Kekewich*, (1906) 1 Ch. 67.) For a consideration of their nature and incidents, *see* Strahan's Eq. Arts. 142, 143.

Common law liens are either *particular* or *general*. A particular lien is the right to retain possession of the goods in regard to which the debt in question was incurred. Thus in the bailments *vadium*, or *locatio operis faciendi*, the bailee has a particular lien on the goods pledged or dealt with for the money advanced on the goods or the labour expended in connection with them respectively. (*Skinner* v. *Upshaw*, 2 Ld. Raym. 752.) A general lien, on the other hand, is a right arising by express or implied contract, to retain possession of goods until payment is made by their owner of any balance due on transactions between him and the person in possession of his goods. Such a contract is implied in certain trades and professions. Thus, a solicitor has a lien on the papers of his client for remuneration due to him for professional services. (Under the Solicitors Act, 1860, the Court may declare a solicitor employed in a suit or action entitled to a charge upon any property recovered or preserved in such suit or action.) Again, an innkeeper has a lien upon the goods of a guest for the amount of the guest's unpaid bill (*Mulliner* v. *Florence*, 3 Q. B. D. 384); and under the Innkeepers Act, 1878, s. 1, the innkeeper under certain circumstances is entitled to sell the guest's goods to satisfy the debt. And in many other trades, such as those of wharfingers, factors, bankers, calico printers, &c., by the custom of the trade such a lien is implied.

A common law lien, whether particular or general, gives, as has been said, merely the right to retain the goods. Wherever there is a further right to sell, as in the case of innkeepers' liens, that right arises under statute. And the lien may be lost either by parting with the possession of the goods, or by taking some other security in lieu of it. But merely taking another security is not in itself sufficient to deprive the possessor of the goods of his lien on them unless there is something in the taking of the security inconsistent with the continuance of the lien.

Part VI.

PROPRIETARY RIGHTS NOT OVER THINGS.

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Proprietary Rights not over Things.—Hitherto we have been considering rights which are more or less strictly rights of property. The rights we are now to deal with are, strictly speaking, not rights of property at all, since they do not subsist over any existing physical object. (*See supra, p.* 2.) They are, however, commonly regarded as proprietary rights, since they usually are lucrative, and therefore property in the popular sense. Most of them are also proprietary in the further sense that they are not mere rights against certain persons (*jura in personam*), but rights availing against the whole world (*jura in rem*).

It is not intended to treat of these rights at any length, partly because they do not properly come within the scope of this work, and partly for the more practical reason that it is impossible to give a satisfactory sketch of all of them without entering upon an exposition of matters very far removed from the most liberal conception of what is properly included under the term property. Once the strict meaning of property as ownership over physical objects is departed from, it is very difficult to draw the line and say what is and what is not within the sense of that word. This is sufficiently shown by the example of many text writers who, in what purported to be treatises on the law of personal property, have found themselves compelled to deal with the law of contracts, the law of wrongs (or torts) and the law affecting joint stock companies, patents, copyrights, insurance, arbitration, trademarks—in short, almost every department of jurisprudence outside that relating to crime. Even a separate treatise as large as the whole of the present work would be of little use as a guide to this vast territory. All that can be done in a chapter of such a treatise is to indicate shortly the nature of the rights most closely akin to proprietary rights in their true sense, and leave the reader to seek in special works information concerning those other rights which we have indicated, but to which we will not further refer.

As has been indicated, these rights are very diverse in their nature. They may be divided roughly into four classes:—*rights or choses in action; annuities or rights to annual payments not charged upon land; rights or interests in corporations aggregate;* and *monopolies*. Generally speaking, all these rights are personalty, but some of them are hereditaments, and some of them are not merely hereditaments but tenements also, and, as such, entailable under the statute *De Donis*.

Choses in Action.—Formerly, pure personalty was divided into *choses in possession* (or goods) and *choses in action* (or rights of action), on the same lines as pure realty was divided into corporeal and incorporeal hereditaments. Of late years, however, many other kinds of proprietary rights which, though personalty and incorporeal in their nature, are not rights of action merely, have sprung up, usually under particular Acts of Parliament; and choses in action are consequently now regarded no longer as a main class of personalty, but only as one division, and that not the most important, of a main class which, as opposed to the other main class, choses in possession or corporeal personalty, is now commonly called incorporeal personalty on the analogy of the great divisions of realty.

Choses in action arise primarily either *ex delicto*[1] or *ex contractu*.[2] If a person wrongfully damages me in my person, in my reputation, or in my property, I have a legal right to obtain compensation for the injury. If he lawfully contracts with me to pay me a certain sum of money or to do a certain act, I have a legal right to obtain payment of the money or performance of the act, or compensation in lieu of performance. If the person refuses to recognize my legal rights in such circumstances, my only means of enforcing them is by an action at law. These legal rights, then, are rights which can only be enforced by action. They were therefore called choses (or things) lying in action.

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[1] Some writers object to rights of action *ex delicto* being called choses in action (*see* Sir H. Elphinstone's Article, p. 311, Law Quarterly, vol. 9), chiefly on the ground that a mere expectation of damages for a wrong committed can scarcely be called property. Such expectations, however, are treated as property in the Bankruptcy Act, 1914 (sect. 167); and the older writers, when they use the phrase "chose in action," apply it to rights both *ex delicto* and *ex contractu*. (Termes de la Lay, *Chose in Action*.) In Roman law rights *ex contractu* and rights *ex delicto* rank together as obligations.

[2] An example of a chose in action arising neither *ex delicto* nor *ex contractu* is judgment for costs in an action. (*See Hambleton* v. *Brown*, (1917) 2 K. B. 90.)

The policy of the ancient common law being to discourage litigation, assignments of choses in action were not permitted by it. This policy was carried so far, that if any third person assisted the owner of a chose in action to prosecute his claim, he was guilty of *maintenance*; while if a condition of the help was that the third person was to receive a share or all of the damages or debt recovered, he was guilty of *champerty*. Gradually, however, a distinction in choses in action was admitted. Where the action was for the doing of an act or for damages for the breach of a duty arising either from contract or wrong, the old rule remained. But where it was for the payment of an ascertained (or liquidated) sum of money—that is, a *debt*—the law permitted a third person not only to sue in the name of the owner of the right, but to sue for his own private benefit and at his own cost. (Bro. Abr. tit. *Chose in Action*, pl. 3; 15 Hen. VII. c. 2.) The authority which the owner of the debt gave to the third person to sue in his name was called a *power of attorney*. It did not need to be by deed, and if given for valuable consideration, it was irrevocable by the original owner of the debt. This was as far as the ordinary common law went in the matter of assigning choses in action.

Two other agencies, however, soon carried the right to alienate choses in action much further. The first of these was the practice of merchants. The second was equity. And both these agencies have been helped from time to time by Acts of Parliament recognizing or extending their operation.

By the practice of merchants, which on this point is now declared by the Bills of Exchange Act, 1882, when a debt was secured by what is called a *bill of exchange*, the right to sue for it passed along with the title to the bill itself, which was freely transferable. "A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person or to bearer." (Sect. 3, sub-sect. 1.) The person who draws the bill is called the *drawer*, the person on whom it is drawn is called the *drawee* until he accepts the bill—that is, writes "Accepted" and his name across the face of it—when he becomes the *acceptor*, and is primarily liable for the amount payable on the bill; and the person to whom the payment is to be made is called a *payee*. When the bill is payable to a person "or bearer," it is transferable by delivery; when to him "or order," it is transferable only by indorsement, that is, by the payee writing his name on the back of the bill and delivering it to the new holder. (Sect. 31.) After indorsement, the transferor becomes an *indorser* of the bill, and is liable on it, should it, on being presented to the drawee for acceptance or payment, be dishonoured, that is, should acceptance or payment then be refused. Bills may be made payable on sight, or so many days after sight, or at any fixed time. When they become immediately payable, they are said to have *matured*.

A bill of exchange is not merely assignable—it is *negotiable*. In other words, any person who takes it *bonâ fide* and for value acquires a good title to it, even though the person who assigned it to him had no title to it. In this respect it resembles coin, bank notes, and other promissory notes (3 & 4 Anne, c. 9, made perpetual by 7 Anne, c. 25, and now repealed and re-enacted by the Bills of Exchange Act, 1882), and bills of lading (Bills of Lading Act, 1855), which are negotiable also. After maturity a bill or note ceases to be negotiable, though it remains assignable. (Sect. 36, sub-sect. 2, Bills of Exchange Act, 1882.)

Exchequer bills payable to bearer are also negotiable, and so are multitudes of securities for debts issued by foreign governments and corporations and made on the face of them payable to the bearer. (*London Joint Stock Bank* v. *Simmons*, (1892) A. C. 201; *Webb, Hale & Co.* v. *Alexandra Waters* (1905), 93 L. T. 339.) Debts due to the Crown have always been assignable by the Crown.

The other agency which advanced the right to alienate choses in action was equity. Equity recognized two classes of choses in action—legal and equitable. Legal choses in action were, of course, those known to the common law; equitable, those enforceable only in the Court of Chancery. Of the latter, the most important, perhaps, were claims to legacies, for which the common law supplied no effective remedy. The latter kind of choses in action equity permitted to be freely assigned, and after assignment the assignee might sue in Chancery in his own name. As to legal choses in action, practically all those arising *ex contractu* or in the nature of a debt, equity permitted to be alienated so as to enable the assignee to sue in the name of the assignor. Such alienations, however, did not bind the debtor until he had received notice of them, and they were not allowed to operate in such a way as to prevent his setting off against the assignee any claim he would have been entitled to set off against the original creditor, or as to render invalid any prior assignment of the debt or part of it of which the debtor had received earlier notice. That is what is meant by an assignment subject to all equities.

Besides promissory notes, to which we have already referred, policies of assurance of lives (30 & 31 Vict. c. 144) and of marine assurance (31 & 32 Vict. c. 86) have been made assignable at law by Act of Parliament. And now, by sect. 25, sub-sect. 6, of the Judicature Act, 1873, it is enacted that any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual at law (subject to all equities which would have been entitled to priority over the right of the assignee if that Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor. (*See Brandts, Sons & Co.* v. *Dunlop Rubber Co.*, (1905) A. C. 454.)

The effect of this enactment is, shortly, to make every chose in action assignable in equity assignable at law. Consequently, all debts and rights of action *ex contractu* are now assignable, and all rights arising before breach under contracts, save such as are, by the terms of the contract, not assignable, or from the nature of the contract are not capable of being performed by persons other than the parties to it. Contracts of the latter kind are called personal contracts, and are usually for personal services. How far rights of action *ex delicto* are assignable it is very difficult to say. Apparently, in cases where the damages are practically liquidated, as in actions of detinue and trover (where the damages are the value of the property detained or converted), the right of action may be assigned. (*Cohen* v. *Mitchell*, 25 Q. B. D. 262.) Actions for injuries not to the property but to the person or reputation of the litigant, appear, however, still to be within the old rule which prohibited assignments of choses in action.

On bankruptcy the bankrupt's rights of action—save only those for personal torts—vest in the trustee, as we have already seen. And under the Act for extending the remedies of creditors against the property of debtors (Judgments Act, 1837, s. 12), securities for debts due to the debtor may be seized by the sheriff under the writ of *fieri facias*. And now, by the Rules of the Supreme Court, 1883 (Ord. XLV. r. 1), the Court can order that all debts owing or accruing to a judgment debtor may be attached to answer the judgment. Such an order is called a *garnishee* order.

On the death of their owner, choses in action arising *ex contractu* vest in his personal representatives, save where the chose in action is merely a right or benefit arising under a personal contract, in which case it is extinguished by the death of either party to the contract before performance and before breach. On the other hand, choses in action *ex delicto* are extinguished by the death either of the person who suffered or of the person who committed the wrong before verdict, in all cases, save where the wrong was an injury to property, or where, being a personal tort, it comes within Lord Campbell's Act, 1846 (amended by 27 & 28 Vict. c. 95). As to injuries to property on the death of a person whose personal estate (4 Edw. III. c. 7), or whose real estate (3 & 4 Will. IV. c. 42, s. 2), has during his lifetime suffered by another's wrong, the executors or administrators of the deceased may bring an action for such wrong, and the damages recovered are to be part of the deceased's personal estate. As to injuries to real estate, the injury must have been done within six months before, and the action must be brought within one year after, the death of the person whose estate is injured. On the other hand, by 3 & 4 Will. IV. c. 42, s. 2, on the death of the wrongdoer—or tort-feasor as he is called—the person wronged can bring his action against the deceased tort-feasor's executors or administrators within six months after these executors or administrators have taken on them the administration of his estate. As to personal torts, when the wrong in question caused the death of the person wronged, Lord Campbell's Act gives a right of action against the wrongdoer for the benefit of the deceased's wife, husband, children, parents, or grand or step children or parents. Such action must be brought within one year of the death of the deceased. With these two exceptions, the maxim of the common law, *Actio personalis moritur cum personâ* (a personal action dies with the person), still applies to all rights of action *ex delicto*. (*Pulling* v. *The Great Eastern Rail. Co.*, 9 Q. B. D. 110.)

Annuities.—We have already dealt with annuities charged upon land. Annuities not charged upon land are called *personal annuities*. They are personalty, and yet they can be held for estates for life, and in fee simple, and when held in fee simple they will, on the owner's death intestate, go to his heir. They are for this reason sometimes called personal hereditaments. They are not, however, tenements, and cannot, accordingly, be held in fee tail. A limitation to the grantee and the heirs of his body creates merely a conditional fee which the grantee can alienate on the birth of issue. (*Earl of Stafford* v. *Buckley*, 2 Ves. sen. 171.) And a personal annuity granted to a man and his heirs will pass under a general bequest of the grantee's personal estate, while one granted to a man "for ever" will, on the grantee's death testate or intestate, go, like ordinary personalty, not to the grantee's heir or devisee, but to his executors or administrators.

Perhaps the commonest kind of annuities not charged on land is *consolidated bank annuities*, or, as they are usually called, *consols*. These are perpetual annuities (subject to redemption) granted by the Crown as interest for money borrowed by it for national purposes. They are redeemable on the repayment of the money borrowed. Under the National Debt (Conversion) Act, 1888, the annuities are now (since April, 1903) fixed at the rate of $2\frac{1}{2}$ per cent. per annum on the borrowed money. The dividends are payable quarterly, and the right to them is called stock or stock in the funds. The right is personalty, and on the death of the stockholder it devolves upon his executor or administrator.

Originally bank annuities were ordinary personal annuities—indeed, they seem to have been the original of personal annuities as now known to the law; but since the national debt was funded, shortly after the Revolution, their legal incidents have been set out in the Acts of Parliament under which the various public loans were raised. These Acts have now been consolidated by the National Debt Act, 1870.

The most noteworthy incidents of stock in the funds are these:—

(a) All dividends on it are paid at, and all transfers of it must be made in the books of, the Bank of England or of Ireland. (Sect. 22.) Before allowing any transfer, the Bank may, if they think it expedient, demand evidence of the title of the person claiming a right to transfer. (Sect. 24.)

(b) The interest of a deceased stockholder is transferable by his executors or administrators notwithstanding any specific bequest of it; but the Bank need not transfer the interest till probate of the will or the grant of administration has been left with them for registration, and they may require all executors who have proved the will to join in the transfer. (Sect. 23.)

(c) The stock may be converted into stock certificates payable to bearer and transferable by delivery. (Sect. 26.)

(d) Any one having an interest in stock standing in another's name may prevent any transfer of it by serving on the Bank an office copy of the affidavit as to his interest, and of the notice required under Rules of the Supreme Court, Ord. XLVI. r. 4. This process is equivalent in its effect to the former writ of *distringas*.

(e) Stock cannot be taken in execution under a writ of *fieri facias*; but under Judgments Act, 1837, ss. 14 and 15, and 3 & 4 Vict. c. 28, s. 1, a judgment creditor can obtain a charging order on the debtor's stock. Such order operates as a *distringas*.

(f) Stock is not "goods" within sect. 4 of the Sale of Goods Act, 1893.

Interests in Corporations Aggregate.—Corporations (*see infra, p.* 386) are of two kinds—corporations sole and corporations aggregate. The former consist of one individual at a time, the latter of more than one. It is with the latter only that we are now concerned.

A corporation aggregate differs from an unincorporated group of individuals owning property together, or acting together for a common purpose, in this respect, that it is recognized by the law as in itself a person (*persona*) or legal unit, having an existence altogether distinct from the individuals composing it.[1] These individuals have no personal interest in its property, and at common law they had no personal liability for its debts. Its acts are not their acts, and they as much as strangers are bound to respect its legal rights. Its corporate identity is manifested by its common seal, which alone gives validity to its corporate acts.

Corporations aggregate may be divided primarily into political and non-political corporations. The former of these include municipal corporations, county councils, and such like, and with them we have little to do save to point out that when they, under the authority of Parliament, borrow money for local works or other public purposes, the stock thereby created corresponds closely to stock in government securities, except that usually it must be redeemed within a given period. Non-political corporations, on the other hand, may themselves be divided into commercial corporations, more commonly called companies,[2] and benevolent or religious corporations, more commonly called societies. It is commercial corporations with which we are now most concerned.

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[1] Apparently this is not the case in war time. *See Daimler Co.* v. *Continental Tyre Co.*, (1916) A. C. 307.

[2] The word "company" is often applied to unincorporated

Commercial corporations—that is, corporations formed for the purpose of making profits for their members—may be established by charter granted by the Crown, or by special Act of Parliament, or by registration under the provisions of the Companies (Consolidation) Act, 1908. Where a corporation is established by charter or special Act, its constitution and powers depend upon the provisions of the charter or Act. These, however, usually follow similar lines; and to ensure this in the case of corporations established by special Act the general provisions contained in the Companies Clauses Acts, 1845—1869, are made applicable to them unless expressly excluded by the special Act. Besides these, there are numerous other Acts of a similar character applying specially to companies formed for definite purposes, such as constructing gasworks or waterworks for towns, harbours or piers, cemeteries, &c. The object of all these Acts is to give uniformity, as far as possible, to corporations established by special Acts for similar purposes.

Charters and special Acts are now the means used for establishing commercial corporations of a public nature, such as corporations having semi-sovereign rights in foreign countries and corporations carrying on great public undertakings, like railways, town waterworks, &c. The common mode of incorporating companies for ordinary trading purposes is by registration under the Companies (Consolidation) Act, 1908.

That Act prohibits the formation of any banking partnership of more than ten members, and of any other

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groups of individuals carrying on business in common, each individual having a share of the joint capital which he could alienate at will. This latter characteristic distinguishes them from ordinary partnerships—where the relation between the partners is personal, and cannot be altered by the introduction of a new partner, save by common consent—which in other respects they are. (*Smith* v. *Anderson*, 15 Ch. D. 247, at p. 273.)

trading partnership of more than twenty members. (Sect. 1.) A partnership, however, of at least seven members may, under its provisions, be incorporated into a joint stock company by the members subscribing a memorandum of association, and in some cases articles of association, and having these registered with the registrar of joint stock companies. (Sect. 15.) The memorandum of association must in all cases state—(a) the name of the proposed company; (b) the part of the United Kingdom in which it proposes to have its place of business; and (c) its proposed objects. When there are articles of association (as there usually are), these set out the regulations under which the company is to carry on its business. (Sects. 2—5.)

Companies established by registration under the Companies (Consolidation) Act, 1908, differ from corporations at common law in two very important respects. Ordinary corporations, as we have seen, must use their common seal to give validity to their corporate acts and, more particularly, their contracts. Joint stock companies need use their common seal only in making contracts which, if made between individuals, would by English law have to be under seal. All other contracts may be made by an agent on behalf of the company in the same way as they are made between individuals. (Sect. 76.) Again, in corporations at common law, the corporators have no personal liability for the corporation's debts. In a joint stock company under the Act, the corporators may enjoy this immunity, or they may enjoy it to a certain degree only, or they may not enjoy it at all, according as the company is limited or unlimited, and their shares in it are fully paid up or not.

In an unlimited company, every member, on the dissolution—or winding-up, as it is called—of the company, is liable rateably with the other members for the company's debts. In a limited company, the members' liability may be limited either by guarantee or by shares. (Sects. 3

and 4.) If it is to be limited by guarantee, then the memorandum of association must state that each member undertakes, in case the company is wound up while he is a member, to be liable for its debts rateably with the other members up to a certain amount. If it is to be limited by shares, then the memorandum of association must state that, and also set out the proposed amount of the company's capital, dividing it into shares of a certain fixed amount. Then each shareholder's liability is limited to the amount of the shares he holds. If the shares are only partly paid up—if, for instance, each of his shares is for 100*l*., and only 50*l*. has been paid up on them—then he is liable to be called upon, either by the company itself, or, on winding-up, by the liquidator, to pay the remaining 50*l*., and if he fails to do so, his shares may be forfeited. If, however, the whole amount is paid up, he is liable for no further calls, either from the company or the liquidator. His shares are then called "fully paid-up" shares.

When a company is limited, either by guarantee or by shares, the word "limited" must be the last word of its registered name, and its registered name must be displayed outside its registered place of business, and must be used in all its notices, bills, cheques, invoices, receipts, and papers generally.

When a company is unlimited, or limited by guarantee, it must, and when it is limited by shares it may, register with its memorandum of association articles of association setting out such regulations as to the conduct of its business as may seem expedient. (Sect. 10.) The memorandum and articles of association together form the constitution or deed of settlement of the company. The articles may be altered subsequently by special resolution of the members of the company (sect. 13), but the memorandum can only be altered in some particulars. Thus the capital may be increased, the shares may be divided into larger amounts, or the paid-up shares may be changed into stock by special resolution. (Sect. 41.) And the name may be changed with the consent of the Board of Trade (sect. 8), and the capital may be reduced with the consent of the Court (sects. 46—58) by a similar resolution. But practically, with these reservations, the memorandum is unalterable.

In all companies a register of members must be kept (sect. 25); and in companies in which the capital is divided into shares, a copy of this register, with other particulars, must be made out annually, and forwarded to the registrar of joint stock companies. (Sect. 32.)

A company registered under the Companies (Consolidation) Act, 1908, is liable to be compulsorily wound up when (*inter alia*) it is unable to pay its debts. It is sufficient to say here that the policy of the Act is to approximate as far as possible the procedure in the winding-up of companies to that on the bankruptcy of individuals. As to the liability of members on winding-up, besides the limitation in the case of limited companies to the amount unpaid on the shares or the amount guaranteed, the following limitations obtain in all cases:—

No past member of any company is liable to contribute—

(a) To the assets in any way where he has, at the date of the winding-up, ceased to be a member of the company for one year or more;

(b) When he has not so long ceased to be a member, to any debt or liability contracted since he ceased to be a member;

(c) In any case, until it appears that the existing members are unable to satisfy the contributions required to be made by them under the Act. (Sect. 123.)

With regard to interests in joint stock companies under the Companies (Consolidation) Act, 1908, the following points may be noticed:—

(a) Shares, stock, or other interests in them are personalty. (Sect. 22.) So are interests in companies established by special Act of Parliament, with the exception of interests in one or two ancient companies, of which the New River and the River Avon are the most notable instances. Interests in these are tenements within the statute *De Donis* (*Drybutter* v. *Bartholomew*, 2 P. Wms. 127);

(b) Fully paid-up shares may be consolidated into stock. (Sect. 41.) The difference between shares and stock is this: shares cannot be assigned in fragments; stock may be so assigned (*per* Lord Cairns, C., *Morrice* v. *Aylmer*, L. R. 10 Ch. App. 148, at p. 154);

(c) A certificate under the common seal of the company is *primâ facie* evidence that the shares or stock therein specified belong to the person in whose name they stand (sect. 23);

(d) Shares and stock may be transferred in the manner prescribed by the regulations of the company. (Sect. 22.) In companies established by special Act incorporating the Companies Clauses Consolidation Act, 1845, transfers must be by deed registered at the office of the company;

(e) Warrants for fully paid-up shares and stock may be issued which will entitle the holder or bearer of them to the shares or stock specified in them. The title to the shares or stock can then be transferred by delivery of the certificate (sect. 37);

(f) Shares and stock of a deceased member are transferable by his personal representative without such representative himself becoming a member of the company (sect. 29);

(g) Shares and stock are subject to the provisions of Ord. XLVI. r. 4, Rules of Supreme Court, and of Judgments Act, 1837, and 3 & 4 Vict. c. 28 (*see supra, p.* 356);

(h) Shares and stock are not goods within sect. 4 of the Sale of Goods Act, 1893.

Companies established by special Acts of Parliament, if they have borrowing powers under their Acts, and companies registered under the Companies (Consolidation) Act, 1908, if, by their memorandum and articles of association, they are entitled to borrow, may raise loans by the issue of *debentures*. By debenture is meant a security for a debt issued under the seal of the borrowing company. It may or may not constitute a charge upon the property of the company (*Edmonds* v. *Blaina Furnaces Co.*, 36 Ch. D. 215), though in ordinary practice it usually does. When it does constitute such a charge, the charge may be on a specific portion of the company's property, and therefore practically a legal mortgage on it; or it may be a charge on the company's undertaking generally, leaving the company power to deal with and dispose of its property in the usual way of business, until a receiver is appointed on behalf of the debenture holders, or until the commencement of winding-up proceedings. In the latter case the debenture is called a "floating" charge. (*Government Stock, &c. Investment Co.* v. *Manila Railway Co.*, (1897) A. C. 81; *In re Yorkshire Woolcombers' Association, Ltd.*, (1903) 2 Ch. 284.) These charges must now be registered. (Companies (Consolidation) Act, 1908, s. 93.)

When debentures are charged on a specific portion of the company's property, they are legal mortgages of it, and the holders have the rights of legal mortgagees. When they are floating securities the holders' ordinary remedy is by appointing a receiver. They have no power of sale unless it is expressly conferred by the trust deed securing the debentures, and if the undertaking be of a public nature, no power to appoint a manager.

A floating charge given by a company within three months of its being wound up is now invalid save as to the amount of cash paid under it to the company immediately after it was made or subsequently, unless it can be shown that the company was solvent at the time the charge was created. (Companies (Consolidation) Act, 1908, s. 212.)

Companies established by Act of Parliament incorporating Part III. of the Companies Clauses Act, 1863, may raise money on debenture stock to the same extent as they are authorized to raise money on mortgages or bonds. The holders of such stock are entitled to their full interest before any dividend is paid to shareholders, but they are not entitled to repayment of their capital, and they are not entitled to share in the government of the company. Companies registered under the Companies (Consolidation) Act, 1908, may be empowered under their memorandum of association to issue debenture stock. Both companies incorporating the Companies Clauses Act, 1863, and companies registered under the Companies (Consolidation) Act, 1908, are required to keep a register of charges affecting their property, and these do not require registration under the Bills of Sale Act, 1878. By sect. 93 of the Companies (Consolidation) Act, 1908, all debentures creating charges on the property of a company registered under the Companies Acts are void as against the liquidator or creditors of the company so far as they are secured on the company's property unless they are registered within 21 days with the registrar of joint stock companies.

Monopolies.—In ordinary language a monopoly means the exclusive right to make, deal in or use a particular thing. In English law, however, the term is applied only to such an exclusive right arising under a grant from the Crown. (3 Inst. 181.) In this restricted sense it is now practically synonymous with what in modern times is usually called a *patent*.

In the broader sense the term includes not merely patents, but *copyright*, *the right of performing dramatic and* *musical compositions*, and the *right* to *trade marks* and *trade names*. For the purpose of arrangement we will use the term in its broader sense, and discuss shortly these different rights under the head of monopolies.

Before treating of these separately we may notice one or two points all have in common:—All are pure personalty; all are freely assignable at law, though trade marks and trade names are not assignable in gross, but only as appendant to the manufactures or business with which they are connected; and as to all, the remedy for all infringement of the owner's exclusive right is an injunction restraining the defendant from further infringement and damages for any injury already done.

By a *patent* is meant a grant from the Crown by letters patent of the exclusive right or privilege of making, using, or selling a certain thing. It is, therefore, a franchise or "a regal privilege in the hands of a subject" (*The Queen* v. *Judge of Halifax County Court*, (1891) 2 Q. B. 263), though, unlike most franchises, it does not savour of the land. At one time the Crown exercised the right to grant patents to make, use, or sell any article, whether that article was the result of a new invention, or something long the subject of manufacture or commerce in the realm. Whether it ever had any legal claim to this power is very questionable. (*See* 1 Hawk. P. C. 231.) At any rate, by sect. 6 of the Statute of Monopolies, 1623, it was definitely prohibited from exercising it except in case of "the working of new manufactures within the realm," and then the patents were to be granted only to the "true and first inventors" of these new manufactures, and were to continue in force for no greater period than fourteen years from the date of the letters patent. (21 Jac. I. c. 3, s. 6.)

The law as to patents is now consolidated by the Patents, Designs, and Trade Marks Act, 1907, which repeals and consolidates many earlier Acts; but the principles regulating the grant of patents are still practically those of the Statute of Monopolies.

Under the Act, patents are granted by the Comptroller of the Patent Office. All applications for them must be accompanied by a provisional or complete specification, and if the accompanying specification be only provisional, a complete specification must be delivered within six months of the application, or the application will lapse, subject to a power given to the comptroller to extend the time one month. (Sect. 5.) A complete specification is a full and fair description of the invention; and if the specification delivered be not full and fair, the comptroller may reject it or may require modifications in it. (Sect. 3.) On acceptance of a specification the comptroller advertises the acceptance (sect. 9), and any person may within two months of the date of the advertisement give notice of objection. (Sect. 11.) The comptroller hears the objection—if any—and should he decide against the objection, or should there be no objection, he issues a patent under the seal of the patent office. (Sect. 12.) There is an appeal from the comptroller of patents to the law officers of the Crown. After grant (or before it) application may be made to amend the specification by way of disclaimer, correction or explanation, provided that at the time of application no proceedings affecting the validity of the patent are pending. If such proceedings are pending, amendment can only be made with the consent of the Court. (Sects. 21 and 22.) If the specification is incomplete, or ambiguous, unless amended, any patent granted on it is void.

It is unnecessary to enter here on a discussion of the law of patents. The following points, however, may be noted:—

(a) The grant of a patent is a matter not of right but of favour. (Sect. 97.)

(b) Patents can be granted only for "the working of new manufactures within the realm."

That is, they must be "manufactures." A patent is not grantable for a mere idea, but for the actual working improvements in the methods of doing or making something.

And they must be "new within the realm." They must, in other words, be either original discoveries, or, at any rate, processes hitherto not publicly practised or known in this country.

(c) They can be granted only to the "true and first inventor" himself—that is, the person who makes the discovery of or imports from abroad the novel process—or if he is dead, his personal representatives. (Sect. 43.)

In the case of a joint application by two or more persons for a patent, it is sufficient if one of the applicants is the true and first inventor, and on the patent being granted the legal estate in it becomes for purposes of devolution their joint property subject to any contract between them, and each is entitled to use it separately, but not to grant licences for its use. The beneficial ownership is held by them in common. (Sect. 37.)

(d) A patent once granted has effect throughout the United Kingdom (sect. 14), and may entitle the patentee to patents in the colonies and in foreign countries. (Sect. 91.)

(e) The duration of a patent is fourteen years from the date of application for it (sect. 17); but this period may, on proof that the patentee has been insufficiently remunerated by receipts under the patent, be extended for a further period of seven or, in exceptional circumstances, of fourteen years. (Sect. 18.) (*In re Bower-Barff Patent*, (1895) A. C. 675.)

(f) The patentee may assign his patent completely, or assign his right as to a certain place, or grant a licence to use it, but on such a sale or licence a condition prohibiting the purchaser or lessee from buying from others than the patentee, or binding him to purchase other articles from the patentee is in general void. (Sect. 38.)

(g) A register of patents is now kept at the Patent Office, and all assignments, complete or partial, of registered patents, must be registered. (Sect. 28.)

(h) When the patent is not being worked in the United Kingdom, the patent may be revoked (sect. 27).

(i) When the reasonable requirements of the public as to the invention are not being supplied, or when some other person than the patentee is prevented from using to the best advantage another invention possessed by him, the Board of Trade may order a compulsory licence to be granted. (Sect. 24.)

The law as to what is called *copyright* formerly was contained in many statutes, commencing with the Engraving Copyright Act, 1734, and ending with the Musical Copyright Act, 1906. These all, except the last mentioned and the Musical (Summary Proceedings) Copyright Act, 1902, and two sections of the Fine Arts Copyright Act, 1862, have been repealed by the Copyright Act, 1911, which consolidates and amends the law on the subject.

That Act confers (sect. 1 (1)) copyright upon every original literary, dramatic, musical and artistic work if—

(a) in the case of a published work the work was first published within the parts of the King's dominions to which the Act extends; and

(b) in case of an unpublished work, the author was at the date of the making of the work a British subject or resident within such parts of the King's dominions.

This extension of copyright to unpublished work is an amendment of the law. Formerly the sole protection for unpublished work was by injunction to prevent its publication as a breach of confidence. (*Caird* v. *Sime*, 19 App. Cas. 326.) This protection is still continued. (*See* sect. 31.)

The word original is also new. It will probably be interpreted as meaning a work which is not a copy of another's work already existing. (*See Walter* v. *Lane*, (1900) A. C. 539.)

Copyright for the purposes of the Act is defined as the sole right to produce or reproduce the work or any substantial part of it in any material form whatsoever; to perform, or in the case of a lecture to deliver, the work or any substantial part of it in public; if the work is unpublished, to publish the work or any substantial part of it; and it shall include the sole right:—

(a) to produce, reproduce, perform or publish any translation of the work;

(b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work;

(c) in the case of a novel or other non-dramatic work, to convert it into a dramatic work, by way of performance in public or otherwise;

(d) in the case of a literary, dramatic or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered;

and to authorise any such acts.

By publication is meant the issue of copies of the work to the public, and does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture, or the construction of an architectural work of art. (Sect. 1 (3).)

Subject to certain limitations, the most important of which is any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary, any one who, without the consent of the owner of the copyright, does anything the sole right to do which is by the Act conferred on the owner of the copyright, infringes the copyright (sect. 2 (1)), and so does he who sells, &c., distributes or exhibits in public or imports for sale works which he knows are copyright (sect. 2 (2)), or permits at a place of public entertainment for his own profit the performance in public of the work unless he has no reasonable grounds for suspecting that the performance would be an infringement of copyright.

The term for which copyright is to subsist in the work is during the life of the author and fifty years after his death, and the copyright is to belong to the author of the work except where the work is an engraving, photograph or portrait ordered and paid for by another person, or the author was in the employ of another person under a contract of service or apprenticeship, and produced the work in the course of such employment, when the copyright is, subject to some reservations, to be in the person ordering the engraving or the employer. (Sects. 4 and 5.) The owner of the copyright may assign it in writing wholly or partially subject to this, that if he is the author of the work any assignment save by will will not prevent the copyright at the end of twenty-five years after his death resulting back to his personal representatives (sect. 5 (2)), except when the work is part of a collective work.

The ordinary civil remedies are given the owner of the copyright for infringements subject to this, that an innocent infringer is not liable to damages. (Sect. 8.) Actions for infringements are limited to three years next after the infringement. (Sect. 10.) Registration at Stationers' Hall is abolished. Summary remedies are provided against persons who knowingly infringe copyright. (Sect. 11.)

Elaborate provision is made as to the importation of copyright works, the presentation of copies to certain libraries, and as to works produced by joint authors and mechanical instruments.

Akin also to copyright are the rights to *trade marks* and *trade names*. Trade marks are marks commonly used by manufacturers to distinguish goods or classes of goods produced by them. The Trade Marks Act, 1905, makes provision for their registration at the Patent Office, in a book called the register of trade marks (sect. 4), and no person shall be entitled to institute proceedings for the infringement of a trade mark unless the same has been registered, or registration of it has been refused. (Sect. 42.) Previous to the Registration Acts, the right to a trade mark, like the right to a trade name, had to be acquired by the public use of it; but now an application for the registration of a trade mark is made equivalent to its public use (sect. 39), and accordingly, if no other person be entitled to the mark, it makes a good title to it. And registration is to be *primâ facie* evidence of the registered owner's right to it. (Sect. 40.) The right to a registered trade mark can be assigned only with the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered. (Sect. 22.)

Trade names are names associated by public user with certain firms, or undertakings, or manufactures. When such a name has been so associated for such a time as to become identified in the public mind with the firm, undertaking, or manufacture to which it is applied, then it becomes, in a sense, the property of that firm, or of the proprietors of the undertakings or manufactures. (*Borthwick* v. *Evening Post*, 37 Ch. D. 449.) At any rate, the first users of it have a legal right to prevent any other person so using it as to mislead the public. (*Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch. 893.) When the use of one's own name in a particular way is calculated to induce the public to regard his goods as the goods of another person of the same name, the latter can restrain its use in that way. (*Reddaway* v. *Banham*, (1896) A. C. 211.)

PART VII.

PERSONS UNDER DISABILITIES AS TO PROPERTY.

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Disabilities and Persons. Disability as regards property consists in any incapacity to acquire, hold, or dispose of property in general or some particular kind of property. To make this incapacity a disability it must attach to the person subject to it as an individual or as a member of a certain class. The ownership or alienation of certain things is sometimes made by the general law impossible or illegal. In such cases the incapacity of a given person to own them, or to convey a title to them, is not a disability, but an incident of the legal nature of the thing itself.

We will discuss shortly the law as to disabilities according as they affect natural persons or individuals, and artificial persons or corporations sole and aggregate.

SECTION I.

NATURAL PERSONS.

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General Rule.—With regard to natural persons the general rule is that every individual having the shape of a human being is qualified to acquire and hold all kinds of property recognized by English law. Monsters—that is, creatures born of human parentage but not having the shape of human beings—are, it seems, not within this rule. (Co. Litt. 7 b.) These are subject to a complete incapacity to own property.

Not only has every individual the capacity to hold property, but every individual has the full capacity to dispose of any property he holds. This is the general rule, and the tendency of the Courts has always been to lean against any practice, custom, or statute which infringes it, whether by making certain interests in property inalienable, as the statute *De Donis* attempted to make fees tail inalienable, or by imposing a special disability on a particular grantee as regards a particular grant, as by a condition in general restraint of alienation contained in a grant or settlement.

There are, however, various exceptions to this rule. These exceptions are of two kinds. The first kind are such as affect individuals as regards specific property.

These we shall call *specific disabilities*. The other kind are such as affect individuals as regards property generally, or a species of property generally. These may be called *general disabilities*.

Specific Disabilities.—Specific disabilities are limitations imposed upon particular individuals as to their capacity to acquire, or more commonly to alienate particular property. They may arise (a) under a special Act of Parliament; (b) under considerations of public policy; (c) under conditions of settlement.

(a) *Act of Parliament.*—Sometimes a private Act of Parliament settles a certain estate to accompany a certain title, or as an unbarrable fee tail. In such instances the estate is inalienable, in the sense that the nominal owner of it in fee simple or fee tail is not able to sell the estate for his own benefit. But he can, as life tenant, sell under the provisions of the Settled Land Act, 1882, s. 58.

Sometimes, again, a special Act of Parliament settles Crown lands or lands to be purchased with public funds on a person and his successors in a title of honour. Here the lands are inalienable in the ordinary sense; and in the case of lands purchased with public money, if they be held in tail and the reversion is in the Crown, they are also inalienable under the Settled Land Act (*idem*).

Again, by several general Acts certain pensions granted by the Crown to persons in acknowledgment of or recompense for past services are declared to be inalienable by such persons. In such cases only arrears actually accrued due can be alienated.

(b) *Public Policy.*—When a salary is granted to a public servant to enable him to discharge the duties of his office, or when a pension is granted to a former servant to support him and keep him in readiness for further services, if required, such salary or pension is inalienable on grounds of public policy. When no public duties are connected with the office, or when, by the terms of the pension, the pensioner cannot be called upon for further services, the salary or pension is alienable. (*Grenfell* v. *Dean of Windsor*, 2 Beav. 544.)

Allowances made to married women on separation or divorce from their husbands are also, by the policy of the law, inalienable.

(c) *Conditions of Settlement.*—A general condition against alienation is, as we have seen, a void condition both at law and in equity. An exception to this rule occurs in the case of settlements upon married women. When property is held by trustees for a married woman's separate use, or even when it is her separate property only by virtue of the Married Women's Property Act, 1882 (*In re Lumley, Ex parte Hood-Barrs*, (1896) 2 Ch. 690), equity permits, as a further safeguard of her rights, as against the coercion or persuasion of her husband, that her life interest in it may be made inalienable. This condition is called a condition against anticipation. Under it the trustees are entitled to pay the income to the married woman only when it has actually accrued due, and any attempt on the woman's part to assign the corpus of the property or the income of it not yet accrued due is void. It is not liable for her debts contracted during coverture (*Pelton Brothers* v. *Harrison*, (1891) 2 Q. B. 422), either during coverture or after her husband's death, except she is made a bankrupt during her husband's life. (*Re Wheeler's Trusts, Briggs* v. *Ryan*, (1899) 2 Ch. 717.) The restraint does not apply to income which has accrued due at the time judgment for the debt was recovered (*Hood-Barrs* v. *Heriot*, (1896) A. C. 174); but it does apply to income accruing after the date of the judgment. (*Whiteley* v. *Edwards*, (1896) 2 Q. B. 48.) Nor does the restraint prevent a married woman barring an estate tail to which she is entitled (*Cooper* v. *Macdonald*, 7 Ch. D. 292), or releasing a power under sect. 52 of the Conveyancing Act, 1881 (*In re Chisholm's Settlement*, (1901) 2 Ch. 82), or disclaiming a legacy left to her subject to a restraint on anticipation. (*In re Wimperis*, (1914) 1 Ch. 502.)

The Court has now been given by statute a discretion to deal with a married woman's separate estate restrained from anticipation as if it were not restrained in four cases: (i) Where it is for the benefit of the married woman so to do (Conveyancing Act, 1911, s. 7: *and see In re Pollard's Settlement*, (1896) 1 Ch. 901: *In re Blundell*, (1901) 2 Ch. 221); (ii) where the married woman has commenced legal proceedings, and it is necessary to do so in order to pay costs (Married Women's Property Act, 1893, s. 2); (iii) where she has traded and been adjudicated bankrupt, for the benefit of her creditors (Bankruptcy Act, 1914, s. 52); and (iv) where she being a *cestui que trust* has incited the trustee to commit a breach of trust or has consented in writing to the breach, to compensate the trustee for making good the loss arising from the breach. (Trustee Act, 1893, s. 45. *See Hood-Barrs* v. *Heriot*, (1897) A. C. 177.)

This condition against anticipation is a specific disability superimposed upon the general disability to which every married woman is, or rather was, subject as to property at common law. It binds the property only during coverture. On death of the husband both the general and the personal disability goes, and the widow is able to dispose freely of the settled property, or rather of her interest in it. But should she not dispose of it, or get it from the trustees into her own hands, or notify the trustees that she intends them to hold it free from the restraint (*In re Chrimes*, (1917) 1 Ch. 30), on her remarriage the condition against anticipation will revive along with her general disability, or what now remains of it.

Where, however, a grantee or *cestui que trust* is under no general disability, the only method of preventing alienation is by making his interest come to an end on his attempting to alienate. Thus a gift to trustees for the benefit of B. for life, but in case he attempts to sell his interest or becomes bankrupt, then his interest to determine, is good, subject to two conditions. In the first place, such a settlement cannot be made by a man on himself of his own land or goods. The law considers such a proceeding fraudulent and void. In the second place, any settlement of this kind must contain what is called a gift over on the happening of the condition—that is, it is not sufficient to say, on the grantee's attempting to sell or becoming bankrupt his interest is to cease; words must be put in vesting his interest on that event in someone else.

General Disabilities.—What we have called specific disabilities are commonly regarded not as disabilities proper, but rather as characteristics attaching less to the owner of the property than to the property owned. What we have called general disabilities are commonly considered the only disabilities affecting individuals.

The classes of individuals subject to general disabilities are—(a) *infants*, (b) *married women*, (c) *lunatics*, (d) *illegitimate persons*, (e) *aliens*, (f) *bankrupts*, (g) *convicts*. A very short notice of each of these classes will be sufficient here, since in the course of this work it has been necessary to refer incidentally to most of the disabilities under which they lie.

(a) *Infants.*—An infant—that is, an individual, male or female, under the full age of twenty-one years—is under no disability as to acquiring property by inheritance. He is under no disability as to acquiring property under a will, providing the acquisition is beneficial in its nature. He may also acquire property by purchase for value, but on coming of age he can repudiate the bargain without assigning cause, unless he induced the vendor to sell by fraudulent misrepresentation as to his age. For this reason a contract to sell is not enforceable against the vendor where the purchaser is an infant.

On the other hand, an infant cannot alien his property. If, however, he does alienate it by deed operating by delivery or by feoffment, or in the case of personalty by sale or delivery, the transaction is not void but only voidable. He cannot contract in such a way as to make himself personally or his property liable for his debts, and any promise after twenty-one to pay debts incurred before that age is void. (Infants' Relief Act, 1874, s. 1.) An infant cannot make a valid will (Wills Act, 1837, s. 7), but an infant on military service can make a testamentary instrument which will effectively exercise a power to appoint personalty by will. (*In re Wernher*, (1918) 2 Ch. 82.)

The rule that an infant cannot alienate his property or incur legal debts is subject to exceptions, of which the following are the most important:—

(a) An infant can incur debts for the supply of necessaries. What are necessaries to him depends on his fortune and position in life and actual requirements;

(b) An infant can, under 11 Geo. IV. & 1 Will. IV. c. 47, s. 11, convey lands merely for the purpose of making a title to them in cases where the lands have to be sold or mortgaged for the payment of debts;

(c) Under the Infant Settlements Act, 1855, s. 1, an infant, if a male over twenty, and if a female over seventeen, may, in contemplation of marriage, make a marriage settlement or contract for a settlement, and every conveyance or assignment executed by the infant with the sanction of the Court will be good;

(d) An infant tenant in gavelkind can at the age of fifteen alienate by way of sale for value his gavelkind land by feoffment with livery of seisin, evidenced by deed or writing (*see In re*

Maskell and Goldfinch's Contract, (1895) 2 Ch. 525);

(e) An infant can execute a power of appointment if the power is not over realty (*Hearle* v. *Greenbank*, 3 Atk. 695), is not coupled with an interest, and it clearly appears from the deed creating the power that such was the donor's intention (*In re Cardross's Settlement*, 7 Ch. D. 728);

(f) An infant can present to a benefice.

During his minority an infant's property is managed by his guardian (Military Tenures Act, 1660), or the trustees of the settlement or will under which the property has come to him. Various powers are given by Act of Parliament to the guardian or trustees besides those given by the will or settlement or under the general law. Thus, by sects. 42 and 43 of the Conveyancing Act, 1881, the trustees of an infant's land may enter into possession of it and manage it during his minority and devote the income to his education and benefit. By sect. 60 of the Settled Land Act, 1882, the powers given by that Act to a life tenant may, when the life tenant is an infant, be exercised by the trustees of the settlement, or if there be none, by persons appointed by the Court on the application of the infant's guardian or next friend.

(b) *Married Women.*—We have already, in treating of marriage as a mode of acquiring property, said nearly all that is necessary as to married women's past and present position as to property. We will now merely give an outline of the development of the law on the subject.

At common law the theory was that by marriage the wife's identity became merged in that of the husband, and this theory was rigorously carried out in regard to her property. As we have seen, marriage vested, during the continuance of the coverture, all the rights and obligations of the wife as to her freeholds, leaseholds, goods and choses in action in the husband; and as goods are capable only of absolute ownership, this had the effect of vesting these absolutely in him, while his interest in the other kinds of property was merely temporary. As to all, however, for the time being the husband and he alone had any rights or obligations, and he alone could acquire any rights or incur any obligations. The wife could not bring an action to defend the property, neither could she contract a debt to bind it. She could during the coverture only contract debts as the agent of her husband. and for all torts committed by her during the coverture the husband was and still is liable. (*Seroka* v. *Kattenberg*, 17 Q. B. D. 177; *Earle* v. *Kingscote*, (1900) 2 Ch. 585.) He was also liable for her pre-nuptial debts—that is, the debts she was subject to at the time of her marriage.

As to alienation, the husband was entitled to alienate without the wife's consent her leaseholds and choses in action; but he could not alienate her freeholds. These could only be alienated by the wife with the concurrence of her husband, who had to join in the deed. And the deed had to be acknowledged by the wife before a judge of the superior Courts or of a county court, or before two commissioners (now one) for taking acknowledgments of married women, who examined her apart from her husband as to her knowledge and desires as to what she was doing. (Fines and Recoveries Act, 1833, ss. 77, 79 and 80; and Conveyancing Act, 1882, s. 7.)

Equity altered this state of the law by permitting trustees to hold property for the use of a married woman independently of her husband. This is what is called a trust for the wife's separate use. When property is so held, the wife is entitled to it practically as if she were unmarried or a *feme sole*. She could alienate it *inter vivos*, bind it by her contracts, and devise or bequeath it by her will. Equity, however, permitted her to be deprived of the first two of these powers by a condition against anticipation in the settlement.

Equity interfered with the common law view in another way. When the wife, or the husband in right of the wife, became entitled to property which was recoverable only in equity—such as a legacy—or which was the subject of a suit in equity, the Court, on the application of the wife, would refuse to permit the husband to receive the property until he agreed to settle a portion of it, as approved by the Court, upon the wife and the children of the marriage. This right of the wife was called her equity to a settlement. (*Lady Elibank* v. *Montolieu*, 5 Ves. 737; 1 W. & T.)

This state of the law was altered by the Married Women's Property Act, 1870, and certain other statutes which gave protection to a wife's property as against her husband under certain conditions and circumstances. But most of these were repealed or superseded by the Married Women's Property Act, 1882. As before stated, the effect of that Act has practically been to make all the property of women married since 31st December, 1882, and all the property accruing since that date to women married before it, the wife's separate estate without the necessity of a settlement. It does not, however, interfere with the law of settlement as established before its enactment (sect. 19), and as to the property accrued before 31st December, 1882, to women married before it, the old law still prevails.

Property accruing to married women before 1883 means accruing either in possession or in title. Accordingly, a reversionary interest which accrued in title before 1883, but which fell in since then, is not separate estate within the Act. And accordingly, as to it, the old law as to the wife's equity to a settlement and as to its alienation if freehold by separately acknowledged deed still prevails. (*Reid* v. *Reid*, 31 Ch. D. 402.)

As regards her statutory separate estate, unless she is restrained from anticipating it (*In re Lumley, Ex parte Hood-Barrs*, (1896) 2 Ch. 690), a married woman is practically under no disability now. She can sell it, leave it by will, bind it by her contracts, and sue and be sued as to it precisely as if she were a *feme sole*. If she owns the first estate of freehold under a settlement she is competent to be protector of the settlement. (Married Women's Property Act, 1907.) Indeed, as regards her separate estate, coverture is no longer a disability within the Statute of Limitations. (*Weldon* v. *Neal*, 51 L. T. 289.) In many other respects the Act of 1882 has increased the legal capacity of married women. Thus, they can, without their husbands joining or being joined as co-plaintiffs or co-defendants, sue for and are liable for torts. (The husband, if sued jointly with his wife, still remains liable for her torts.) If they trade they are liable to be made bankrupt. (Bankruptcy Act, 1914, s. 125.) They cannot, however, bind themselves personally for their debts under the Debtors Act, 1869; the creditors' sole remedy (subject to the right to make them bankrupt if they trade) is against their estates (*Scott* v. *Morley*, 20 Q. B. D. 120), though they can now contract without having at the time of contracting any separate estate which they can bind, or any separate estate whatever. (Married Women's Property Act, 1893, s. 1 (a).) They may act without their husband's consent as executrixes or trustees (sect. 18, Married Women's Property Act, 1882), and can convey the property held by them as such without their husbands joining in the conveyance. (Sect. 1, Married Women's Property Act, 1907.) A husband, however, is no longer liable on his wife's contracts, save when she contracts as his agent, nor for her liabilities as executrix or trustee, nor for her pre-nuptial debts or torts, save to the extent of the property he may have received through her. (Sect. 13.) And the wife's property remains liable for these last in spite of any condition against anticipation imposed upon it at her subsequent marriage. (*Kirk* v. *Murphy*, 30 L. R. Ir. 508.)

A married woman takes the nationality of her husband, and this nationality is not lost merely by reason of her husband's death. (British Nationality and Status of Aliens Act, 1914, ss. 10 and 11.)

(c) *Lunatics.*—The will of a person lunatic, idiot, or otherwise of unsound mind—as in consequence of extreme age—is absolutely void. (*Smith* v. *Tebbett*, L. R. 1 P. & M. 398.) The conveyance of such a person is voidable, unless the other party to it was unaware and took no unfair advantage of his lunacy.[1] The rule as to conveyances applies to purchases by a lunatic, and every other form of executed contract. (*Beavan* v. *McDonnell*, 23 L. J. Ex. 94; *Drew* v. *Nunn*, 4 Q. B. D. 661.) A will or conveyance made by a lunatic during a lucid interval is perfectly valid, unless the lunatic is a lunatic so found, when his conveyance, but not his will, is void. (*In re Walker*, (1905) 1 Ch. 160.)

The powers of the Court in Lunacy are now set out in the Lunacy Act, 1890 (as amended by the Lunacy Act, 1891), which repeals and consolidates many earlier statutes. This Act does not extend to Ireland. The jurisdiction over lunatics in Ireland is in the Lord Chancellor of Ireland, and is practically co-extensive with that possessed by the Court of Lunacy in England. (34 & 35 Vict. c. 22.)

Lunatics are either lunatics so found by inquisition or lunatics not so found. When a lunatic is so found a guardian of his person and property—called his committee—is appointed by the Lord Chancellor or Lords Justices having jurisdiction in lunacy. This committee, who is an officer of the Court in Lunacy, manages the lunatic's property subject to the sanction of the Court. (*See* Part IV., Lunacy Act, 1890.) The rule in so managing it is to regard only the lunatic's interest and that of his family, but, subject to this, not unnecessarily to alter the nature of the property so as to affect the respective rights of his heir or next of kin on his death—as by selling realty belonging to him or investing his personalty in realty. (*Oxendon* v. *Compton,* 2 Ves. jun. 72.)

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[1] Formerly a person was not allowed to plead, in avoidance of his conveyance, his own insanity when he made it, on the ground that if he was then really insane he could remember nothing about it. Accordingly, if he died without recovering his wits his heir could have the conveyance voided, but if he recovered them he could not. (2 Bl. Com. 291, 292.)

As has already been pointed out, when a lunatic is protector of a settlement, his committee, with the sanction of the Court in Lunacy, can consent for him to bar the entail; and under the Settled Land Act, 1882, when the life tenant is a lunatic, the powers given him by the Act may be exercised by his committee under the order of the Lord Chancellor or other judges having jurisdiction in lunacy. (Sect. 62.) Where a trustee is a criminal lunatic, jurisdiction over the trust property is vested in the High Court, which can make vesting orders respecting it under sect. 5 of the Trustee Act, 1880. (*In re R.*, (1906) 1 Ch. 700.

As to lunatics not so found, the Court in Lunacy has no jurisdiction independent of statute. (*Re Wilton*, 2 C. P. Coop. *temp*. Lord Cottenham, 208.) Now, however, by sect. 116 of the Lunacy Act, 1890, the provisions of that Act apply to the case of lunatics not so found in all cases of persons lawfully detained as lunatics, and to persons not so detained where it is proved to the satisfaction of the judge in lunacy that they are (a) through mental infirmity arising from disease or age incapable of managing their own affairs, or (b) of unsound mind and incapable of managing their own affairs, and that their property does not exceed in value 2,000*l*. or that the income thereof does not exceed 100*l*. per annum.

(d) *Illegitimate Persons.*—As has already been pointed out, persons not born in lawful wedlock are, in law, *nullius filii* —the children of nobody. They are accordingly incapable of acquiring by inheritance or intestate succession from their parents or any person related to them through their parents. The only relatives they can have whom the law will recognize as relatives are their descendants, to whom they may succeed as heirs-at-law or next of kin.

It may be added that the illegitimate children of a person not being regarded by the law as his or her children, they will not be included in a bequest or devise to that person's children, unless the person in question to the knowledge of the testator was dead (or, if a woman, past child-bearing), having had only illegitimate children (*In re Homer*, *Eagleton* v. *Homer*, 37 Ch. D. 695), or unless the illegitimate children are identified by a sufficient description. (*See In re Fish*, *Ingham* v. *Rayner*, (1894) 2 Ch. 83; Under. & Stra. Wills, pp. 78—89.) As to gifts to illegitimate children as a class, *see In re Mayo*, *Chester* v. *Keirl*, (1901) 1 Ch. 404.

(e) *Aliens.*—Formerly aliens—that is, persons born out of the ligeance of the King (7 Co. 16 a, *Calvin's Case*)—were subject to many disabilities, more especially with regard to the ownership of land. These, however, were abolished by sect. 2 of the Naturalization Act, 1870, which confers upon an alien the same capacity as a subject of the King as to the ownership of all kinds of property. This general provision, however, is limited by sect. 1 of the Merchant Shipping Act, 1894, which denies to aliens the capacity to own any share in a British ship. The Naturalization Act, 1870, is now repealed by the British Nationality and Status of Aliens Act, 1914, which, however, contains similar provisions. (*See* sect. 17.)

(f) *Bankrupts.*—The effect of bankruptcy is to vest all the bankrupt's property at the time he committed the act of bankruptcy in his trustee, and until his discharge all the property which may be acquired by or may devolve upon him. (Bankruptcy Act, 1914, s. 38.) Property, however, which he acquires after his bankruptcy he can transfer to other persons dealing *bonâ fide* and for value with him unless the trustee has intervened before the transaction is completed. (Sect. 47.) A charging order obtained under the Judgments Act, 1838, is not a transaction for value within this provision. (*Hosack* v. *Robins*, (1918) 2 Ch. 389.)

(g) *Convicts.*—The Forfeiture Act, 1870, which abolished forfeiture on a conviction for felony, gives power to deprive a person sentenced to death or penal servitude of the control of his property during the term of his imprisonment (sect. 6). The King may appoint an administrator of his property, and if no administrator is so appointed the justices may appoint a curator. The administrator has full powers to alienate or charge the convict's property and to cause payment or satisfaction of any debts or liabilities of the convict, or claims for maintenance on the part of those dependent on him, to be made out of it. On completion of sentence the property reverts to the convict.

SECTION II.

ARTIFICIAL PERSONS.

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Corporations.—Artificial persons are a number of individuals or a succession of single individuals treated by the law as a single person or unit. When they are so treated they are said to be incorporated, and are called corporations. When they consist of a number of individuals at the same time, they are corporations aggregate; when they consist of a succession of individuals, one at a time, they are corporations sole. Both corporations aggregate and corporations sole have perpetual succession—that is, though the corporators may die, the corporation itself never dies, the corporations aggregate having inherent powers to replace those corporators who drop off; while in the case of a corporation sole, when the sole corporator dies, his successor, whether by inheritance or appointment, succeeds, as from his predecessor's death, to all his predecessor's rights and liabilities without any conveyance or assignment of these.

Now as to land, a corporation aggregate or sole has the capacity to acquire it, and it has that capacity owing to its being a corporation. (*Sutton's Hospital*, 10 Rep. 30 b.) A grant of land in severalty could not be made to a group of individuals unless this group was incorporated. Neither could a fee simple be conveyed to a single person and his successors in a certain office or position unless the holder of that office or position and his successors constituted a corporation sole. But while incorporation is necessary to give a group of individuals or a succession of individuals (not by way of inheritance) the capacity to hold land, by common law a corporation cannot exercise that capacity until it has the licence of the Crown to do so. (Co. Litt. 2.)

The reason of this doctrine of the common law was that the lords of whom land was held were deprived of some of their most valuable rights by the alienation of their land to a corporation, since, owing to a corporation never dying, there were no descents from one owner to another, and consequently no reliefs; and owing to its never being under age, there were no wardships; and owing to its not being an individual, there were no marriages. For these reasons, alienation to a corporation was called alienation in *mortmain* (dead hand).

Numbers of statutes were passed to strengthen the powers of the common law to prevent alienations in mortmain. These have been repealed by the Mortmain and Charitable Uses Act, 1888, and the law is now consolidated in that statute. By sect. 1, there is to be forfeiture to the superior lord of whom the land is held, or, if there be no such lord, to the Crown, if land be conveyed to a corporation in mortmain, unless the corporation has authority to hold land given to it by licence of the Crown or by an Act of Parliament for the time being in force. By sect. 2, the Crown has power to grant a licence to hold land to any corporation.

Most corporations established by Act of Parliament have power to hold such land as may be needed for the purposes for which they were established. Companies registered under the Companies Act, 1862, if their object be gain for their members, have full capacity to hold land; if their object be not gain, they are not entitled to hold land exceeding in extent two acres without the sanction of the Board of Trade. (Sect. 21.)

When land is held in fee simple by a corporation, on the dissolution of the corporation there is no escheat at common law; the land reverts to the grantor or his heirs. It would seem that, as the grantor, then, in granting a fee simple to a corporation, does not give up all interest in the land, a condition against alienation by the grantee is valid. (*See* Challis's Real Prop. pp. 198, 199.)

As to goods, a corporation aggregate has at common law full capacity to acquire and to hold them. A corporation sole, on the other hand, has no such capacity at common law. (Bl. Com. 1, p. 477.) Goods can be settled for the benefit of a corporation sole only by means of a trust, an assignment to the corporator sole and his successors vesting the complete ownership in the corporator himself. An exception seems to occur in the case of the Crown, the state jewels and plate being held by the Sovereign for the time being merely for his or her life. Probably, however, these are to be considered as heirlooms. (*See* Hargrave's note, Co. Litt. 9.) And power to hold goods may be and frequently is given to corporations sole created by Act of Parliament.

Charities.—Closely allied to alienations in mortmain are alienations to charitable uses. These, strictly speaking, are not logically part of our present subject, since the limitations imposed by statute on gifts to charities are not disabilities of persons who take under the gifts, but rather restrictions as to objects for which gifts may be made. These limitations apply equally, whether the donees to whom the gifts for charitable purposes are made are corporations or individuals. Yet the law as to corporations and as to charitable uses is so similar and so intermixed, that it is convenient to treat of both under the one heading.

The law as to charitable uses, which was the creation of many statutes, chief among which was the so-called Mortmain Act, 1736, is now consolidated and amended by the Mortmain and Charitable Uses Acts, 1888, 1891 and 1892. Charitable uses within these Acts are defined by sect. 13 (2) of the principal Act (1888), which is a re-enactment of the preamble of 43 Eliz. c. 4 (Irish Act, 10 Car. I. sess. 3, c. 1), which statute, with most other Acts affecting charities, is repealed. The Mortmain Act, 1736, did not extend to Ireland, nor do the Mortmain and Charitable Uses Acts, 1888-92.

The provisions of the principal Act, like those of the Mortmain Act, apply only to assurances of land, or of money to be laid out in land for charitable uses. These assurances may be validly made, subject to certain conditions laid down in Part II. of the Act. The chief of these conditions are that the assurance is to take effect at once, is to be without power of revocation, reservation or condition, save as permitted therein, and is, if it be of land or personal estate not being stock in the public funds, executed before two witnesses, not less than twelve months before the assuror's death, and registered within six months of execution at the Central Office of the Supreme Court. The provision as to execution before witnesses does not apply in case the assurance is *bonâ fide* for full and valuable consideration, which consideration, by the way, may take the form wholly or partly of a rent reserved by the assurance. If the property transferred be stock in the public funds, the assurance, unless it be made for full and valuable consideration, must be by transfer at least six months before the death of the assuror. (Sect. 4.) Provision is made for validation of the assurance by subsequent registration, where registration within the proper time was omitted by inadvertence. (Sect. 5.)

Under Part III. of the Act are certain exemptions from the provisions of Part II. and also of Part I.—referring to alienations in mortmain—where these assurances are for certain objects. Under this Part, assurances by deed of land of any quantity, and by will of land of the quantities therein stated, may be made for the purposes of a public park, school-house for an elementary school, or museum, provided such assurance, if by deed and not for full and valuable consideration, or, if by will, was executed at least twelve months before the assuror's death, or is a substantial reproduction of a devise in a will made twelve months before the assuror's death, and is enrolled within six months from its execution, if a deed, or the death of the assuror, if a will. The maximum quantity of land devisable for a public park is twenty acres; for a school-house, two; for a museum, one. (Sect. 6.) By the amending Act of 1892, these provisions all save that requiring execution of the assurance twelve months before the assuror's death—are extended to any assurance by deed to a local authority for any purpose for which such local authority is empowered by Act of Parliament to acquire land. By sect. 7, Part II. of the principal Act is not to apply to assurances of land, or money to be laid out in the purchase of land, to or to the use of the Universities of Oxford, Cambridge, London, Durham, and Victoria, or the colleges of these; or in trust for the colleges of Eton, Winchester, and Westminster; or in trust for Keble College; or to assurances to trustees on behalf of associations for religious purposes, or for the promotion of education, art, literature, or science, of not more than two acres of land on which to erect a building for the purposes of the association.

Part II. of the principal Act does not refer to assurances for charitable uses by will. The law as to these is now contained in the amending Act of 1891, the effect of which is, as we have already seen, to give power free from all restrictions to leave land, or money to be laid out in land, to charities; land so left, however, is to be sold within a year, and money left to be laid out in land is not to be so laid out. (*In re Bridger*, (1894) 1 Ch. 297.) This Act does not, it would appear, repeal the provisions of Part II., which still apply to assurances otherwise than by will, and it expressly preserves the exemptions as to land devised for the purposes of a public park, school, or museum contained in Part III. The Act of 1891 is not to be read along with the principal Act, and its object is altogether different. The Act of 1888 was intended to regulate the conditions under which land might be alienated to charities or in mortmain; the Act of 1891 was intended to prevent alienations in mortmain while permitting charities to benefit by the intentions of testators. (*In re Hume, Forbes* v. *Hume*, (1895) 1 Ch. 422.)

As has been said, the Mortmain and Charitable Uses Acts do not apply to Ireland, nor did the preceding Acts repealed by them. The law there is regulated by the Charitable Donations and Bequests (Ireland) Act, 1844. By sect. 16 of that Act no donation, devise or bequest for pious or charitable uses shall be valid to create or convey any estate in lands for such uses unless the deed, will or other instrument containing the same shall be executed three months at least before the death of the person executing the same, and unless every such deed or instrument not being a will, be registered within three months of its execution.

There is a difference between English and Irish law as to the validity of gifts by will for offering up masses for the souls of the dead. Such gifts are held void in England (*In re Egan*, (1918) 2 Ch. 350); but they are not illegal in Ireland (*Charity Commissioners* v. *Walsh*, 7 Ir. Eq. R. 34), and are held to be good charitable gifts, whether the masses are directed to be said in public or not. (*O'Hanlon* v. *Logue*, (1906) 1 Ir. R. 247.) On the other hand gifts for monastic orders connected with the Church of Rome are void in Ireland (*Ellard* v. *Phelan*, (1914) 1 Ir. R. 76; *see In re Greene*, (1914) 1 Ir. R. 305), but seem to be good in England (*In re Smith*, (1914) 1 Ch. 937).

NOTE.

The law as to disabilities stated in the text is the normal law. In time of war it is subject to any alteration deemed necessary for the safety of the realm, and such alteration may be carried out by special legislation or even by the decisions of the Courts (*see per* Lord Halsbury in *Daimler Co.* v. *Continental Tyre Co.*, (1916) 2 A. C. 307). Such alterations, however, are in the nature of administrative measures and transitory. It is scarcely desirable, especially as the Great War is now over, to discuss them in an institutional work such as this.

APPENDIX A.

COPYHOLDS.

Copyhold tenure has already been mentioned in Part II. It is proposed here to treat briefly of its origin, nature, and incidents, and of the means provided by recent legislation for enlarging it into freehold tenure. The course of English law in this matter is plain. The copyholder was originally a villein holding land merely at the will of his lord, and obliged to perform various "base services." Custom gradually fixed those services, and provided that the villein and his descendants should remain in possession of the land so long as they performed the services thus fixed. This custom was at first recognised only in the manorial court to which the villein was subject; gradually the common law came to recognise and enforce it, and the villein thus became a copyholder, with a legal interest in his land of which he could dispose. Finally, modern legislation provides means by which the copyholder can free himself from the services, and acquire a freehold interest in his land.

I. First, then, as to *the origin and history of copyhold tenure*. For this we must go back even before the Conquest. All copyholds are some parcel of a *manor*; and although this name is of Norman origin, and though the relation of a lord of a manor to his tenants was developed and strictly defined by the Norman feudal lawyers, yet even in Saxon times there are traces of the existence of the manor, in the sense of a group of lands cultivated in common by their holders, who owed some sort of duties to a lord. It seems probable that in many cases the Conquest did but change Saxon lords for Norman, and define the relation of lord and tenant on more strictly feudal principles. Confining ourselves to the manor as existing in Norman times, we may describe it as "a jurisdictional, a geographical, and an economic unit,"[1] a district of lands, holden by a lord, and by tenants under him, over which lands and tenants he exercised certain rights, including rights of jurisdiction. The lands forming a manor were (*a*) *demesne lands*, which comprised lands in the lord's own occupation, and waste lands over which the tenants of the manor had generally rights of common, (*b*) *tenemental lands*, *i.e.*, lands granted to free tenants in consideration of rents and free services, which tenants are now represented by the freeholders of the manor, and (*c*) the *villenagium*, or lands occupied by villeins or serfs, from whom the present copyholders or customary tenants have sprung. (*See* Pollock & Maitland, Hist. Eng. Law, vol. 1, p. 345.) The freehold tenants owed, as one of their services, attendance in the court of the manor, called the *Court Baron*, in which they were the judges, the *pares curiæ*, and the lord or his steward the president. There are thus three essentials of a manor: (*a*) demesne lands, allotted as described above, and including the *villenagium;* (*b*) a court-baron; (*c*) free tenants in fee, holding of the lord by services, which include attendance on this court.

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[1] The student will find some of the results of recent investigations on this subject conveniently collected in Medley's Constitutional History, ch. 1, s. 5.

It is with the villeins, whom the lord allowed to occupy portions of his demesne, that we are particularly concerned. They were the non-free tenants of the manor, *villani adscripti glebæ*, or, in Norman phrase, *villeins regardant*, *i.e.*, villeins attached to the soil. Such land as they had they held merely at the will of the lord, to whom they rendered "base services," usually in the cultivation of his lands. The criterion of villein tenure seems at first to have been the *uncertainty* of the service which the villein might be called on to perform; as the phrase went, he did not know in the evening what he should have to do on the morrow. But the custom gradually came to fix the services which a lord could demand from his villeins, and they were largely commuted for payments in money or producee. In fact, it was to the lord's advantage to continue the villeins in possession of their lands, so long as they performed their services; and he could derive profit from allowing them to dispose of those lands to their children after them, or to strangers, in consideration of a payment made to the lord. Thus there grew up in manors various customs giving the villeins virtually estates of inheritance in their lands and a modified power of alienation; that is, they came to have what we may call a *morally-sanctioned interest* in their lands, known as *villenagium*.[1] At first, the only court to take cognizance of this interest was the manorial court. The villeins attended it not as members, but as suitors; its decisions, based on the custom of the manor, regulated their dealings with their lands, the services which they were to render, the payments to be made to the lord; its rolls recorded all these decisions and proceedings; and hence the rolls of the manorial court formed the evidence of the manorial customs, while a copy of an entry on the roll relating to a tenant was his title-deed. So common and regular grew these proceedings that they came to be recognised by the King's Courts; the customs of the manors acquired legal validity; and thus, by the time of Edward IV. (Littleton, c. 9, s. 73), the villein regardant had become a copyholder, with rights which he could assert even against his lord. Henceforth the modern definition of copyhold applies—"estates in some parcel of a manor founded on the lord's grant and tenant's admittance enrolled in the customary court, amounting in law, apart from the custom, to mere tenancies at will, but where the custom comes into question, having a more permanent character." (Elton on Copyholds, p. 2.)

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[1] *Villenagium* had previously meant "*land* occupied by villeins"; it came to mean "a villein's *interest* in his lands." See further on the subject of villein services, P. & M. Hist. Eng. Law, vol. 1, p. 354.

II. The *Nature and Incidents of Copyhold Tenure.* Copyhold tenure, or tenure by copy of court roll, is a customary tenure, *i.e.*, its incidents are fixed by custom. Such custom is of two kinds: (*a*) the *general custom* of copyholds, now forming a part of the common law, of which the Court will take judicial notice; and (*b*) *special customs*, prevailing in particular manors, which Sir George Jessel has called "local common law." These latter customs must be strictly pleaded and proved; and the essentials to the validity of such a custom are its being local, certain, reasonable, and continuous. The incidents of copyhold tenure may thus vary somewhat in different manors, but its main features are constant, and are briefly as follows:—

The freehold and seisin of the lands are in the lord, the tenant having a customary interest and possession. (*Eardley v. Granville*, 3 Ch. D. 826.) The *extent* of the tenant's customary estate is regulated by the custom of the particular manor. Generally, estates can subsist in copyholds, analogous to freehold estates for life or in fee; an estate tail in copyholds can subsist only in a manor where a particular custom permits of it, and in the absence of such a custom, an attempt to entail copyholds creates a fee-simple conditional. (*Heydon's Case*, 3 Rep. 7 a.) The *descent* of copyhold lands is governed by the custom of the manor wherein they are situate, and, in the absence of special custom, by the common law rules. The most usual *incidents* of copyhold are the following:—

(*a*) *Freebench*. This is the interest of a widow in her husband's copyholds; and it is to be noted that the Dower Act, 1833 (3 & 4 Will. IV. c. 105), does not apply to copyholds. Its extent depends upon the custom, and it is not always the third which a dowress took at common law.

(*b*) Like this is the *customary curtesy*, the widower's estate in his late wife's copyholds. Here the custom is usually, but not always, the same as at the common law.

(*c*) *Fines*. These are payments due to the lord on various occasions fixed by custom. The most usual are on the death of the lord, on a change of the tenant, on a licence empowering the tenant to aliene. Fines are either fixed or arbitrary, but if arbitrary, they must be reasonable. (*Willowes' Case*, 13 Rep. 1.)

(*d*) *Other services* due from the tenant. Of these *fealty* and *suit of court* are universal; another common service is the payment of *heriots*, usually on the death of a copyholder. (*Damerell* v. *Protheroe*, 10 Q. B. 20.) *Rent* also is sometimes due.

(*e*) *Rights of Common*. Copyholders are often entitled to exercise commonable rights over the waste of the manor.

(*f*) *Escheat and forfeiture*. Generally, the estate of a copyholder escheats to the lord on the tenant's death intestate and without customary heirs. The estate is forfeited to the lord on the tenant's doing any wrongful act to the lord's prejudice, *e.g.*, anything amounting to a determination of his tenancy without the lord's consent; by failure to perform the due services; by committing either voluntary or permissive waste, unless a custom allows waste. If the heir or devisee of a deceased copyholder does not claim to be admitted, after due proclamation, the lord can seize the lands *quousque*, *i.e.*, until a claimant appear. (*Doe* v. *Hellier*, 3 T. R. 162.)

III. *Mode of Alienation of Copyholds*: (1) *inter vivos*; (2) by will.

1. A copyholder could not use the common law forms of conveyance, for, being in the eye of the common law a tenant at will, he had, strictly speaking, no estate to convey. What he could do was to surrender his interest to the lord, praying him to admit to possession of it the person to whom the tenant wished to transfer it. This surrender was made in the manorial court. It was customary for the lord to admit the alienee, on payment of the usual fine; and this custom grew so strong that the lord was considered bound by a trust to admit the person designated by the surrender.[1] This

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[1] It may be useful to compare this with the "Ulster custom," as to alienation of a tenant's interest in Ireland, *p.* 401, *infra*; but in the case of the Ulster custom, there seems to have been no actual trust binding on the landlord.

trust would, in mediæval times, have been enforced by the Chancellor (Spence, Equitable Jurisdict. vol. 1, p. 648); in modern times it would be enforced by a common law court by mandamus. Thus the legally recognised mode of conveying copyholds is by *surrender and admittance*. The essential of a surrender is the giving up of the customary seisin to the lord, who can then only refuse to carry out the admittance if the conveyance is improper in form or prejudicial to his interest, *e.g.*, he can refuse to admit a corporation, since, as it is immortal, he would lose the fines payable on death. The person who can surrender is the person who could convey the land, if freehold, by an ordinary assurance. A copy of the record of this surrender and admittance on the court rolls is delivered to the new tenant, and is his muniment of title. The process need not be gone through in the court; a surrender may be made out of court to the steward or his deputy, and the vendor's solicitor is usually appointed deputy steward for the time being, in order to take his surrender. The admittee can now be admitted by his attorney, appointed for that purpose orally or in writing. (Copyhold Act, 1894, s. 83.) A tenant for life under the Settled Land Act, 1882, can, in exercising the powers of that Act, convey *by deed* settled copyholds vested in trustees for him, which deed is entered on the rolls, and the grantee is then entitled to admittance without any surrender. (45 & 46 Vict. c. 38, s. 28 (3).)

A *mortgage of copyholds* is effected by a covenant to surrender them conditionally, followed by a surrender conditioned to become void on payment of the debt and interest. This is entered on the rolls, and on the mortgage being paid off, the mortgagee executes a warrant to the steward to enter satisfaction of the conditional surrender. When satisfaction is thus entered, it has the effect of the reconveyance in an ordinary mortgage of freeholds.

2. Originally, copyholds were not devisable. The copyholder made a surrender to the uses of his will, which then operated merely as a declaration of those uses. An Act of 55 Geo. III. c. 192, made devises of copyholds not surrendered to the uses of the testator's will as valid as if they had been so surrendered. And the Wills Act, 1837 (1 Vict. c. 26), s. 2, made copyholds freely devisable by wills made or republished after its date. (*See Howard* v. *Gwynn*, 84 L. T. 505.) The estate vests in the customary heir until the devisee is admitted. (*Garland* v. *Mead*, L. R. 6 Q. B. 441.)

On the death of a copyholder if his estate is legal the right to admittance vests in his devisee if the deceased left a will, and in his customary heir if he died intestate. This is the case whether he holds his estate beneficially or as trustee or mortgagee, legal copyholds not being within either sect. 30 of the Conveyancing Act, 1881 (*see* Copyhold Act, 1894, s. 88), nor sect. 1 of the Land Transfer Act, 1897. But if the copyholder's estate is equitable it comes within both of these enactments and vests like freeholds in the deceased's executors or administrators. (*In re Somerville and Turner's Contract*, (1903) 2 Ch. 583.)

IV. *Change of Copyhold Lands into Freehold.* There are two ways in which copyhold land may cease to be held "according to the custom of the manor": (1) by extinguishment; (2) by enfranchisement.

1. Extinguishment occurs when the freehold and copyhold interest in the same land and in the same right are united in one person. Thus, if the copyholder surrenders his land, to the use of the lord, or without declaring any use; or, if the lord conveys the land to the copyholder for an estate of freehold, or even a term of years, the copyhold is merged and extinguished in the freehold. But if the lord acquires the land by descent, forfeiture, escheat, &c., and there is no act on his part showing an intention to destroy the copyhold tenure, it is only suspended, so long as he does not alter the demisable nature of the tenement, and on a re-grant by him the land is still copyhold. (*See* sect. 81, Copyhold Act, 1894.)

2. Enfranchisement may take place (*a*) at common law, or (*b*) under statute. It is the conversion of the copyhold estate *in the hands of the tenant* into an estate of freehold.

(*a*) *At common law* it is effected by an agreement between the lord and tenant, and then avails only to the extent of the lord's interest; if he has, *e.g.*, an estate for life, such voluntary enfranchisement would not be complete as against the remainderman.

(*b*) *By statute.* A series of Acts known as the Copyhold Acts of 1841, 1843, 1844, 1852, 1858, and 1887, have provided means by which either lord or tenant could procure enfranchisement of the lands. These Acts have now been consolidated in the Copyhold Act, 1894 (57 & 58 Vict. c. 46).

This statutory enfranchisement may be voluntary or compulsory. *Voluntary enfranchisement* is effected by agreement between the lord and tenant, with the consent of the Copyhold Commissioners (now the Board of Agriculture), followed by a conveyance from the lord to the tenant with their consent; and it is complete, even though the lord have only a limited interest, if proper notice be given to the remaindermen or reversioners. (Part II. Copyhold Act.) *Compulsory enfranchisement* may be compelled by either lord or tenant. (Sect. 1.) The consideration is ascertained by a valuation of the lands, either by valuers appointed by the parties, or by the Board of Agriculture, if the parties cannot agree upon it. (Sect. 5.) An award of the Board, in pursuance of this valuation, has, when finally confirmed, the effect of a conveyance. (Sect. 10.) The effect of enfranchisement, as has been said, is that the lands become of freehold tenure and subject to the common law rules; but the lord's rights as to escheat for want of heirs, and the tenant's rights of common are preserved. (Sect. 21.) A copyhold tenant is now entitled, on succeeding to his estate, to a written notice from the lord, setting out the tenant's right to compel enfranchisement on payment of the compensation to the lord and the fees to the steward of the manor, as ascertained under the Copyhold Act. (Sect. 42.) The compensation and fees may, in certain cases, be charged on the land enfranchised by a certificate of the Board of Agriculture—which certificate will then be transferable by endorsement (sect. 41), or by deed executed by the owner of the enfranchised land. (Sect. 36.)

APPENDIX B.

THE IRISH LAND ACTS.

We have just seen—in treating of copyhold—how a tenancy, which was at first merely to continue so long and on such conditions as the landowner pleased, gradually became a permanent tenancy at fixed services; how from being a permanent tenancy it became by custom, enforced by the King's Courts as law, an hereditary estate in the land subject to certain rights and payments due to the original owner; how, when this state of affairs had long been established, Parliament interfered to put an end to the double ownership of the land, and did so by conferring on the tenant the right to buy out the original owner, and become himself the nominal as well as the real owner of the land.

The earlier stages of this process were accomplished without the aid of express legislation, by the natural growth of general practice into law. It was consequently a slow process—the work of centuries. We come now to the consideration of a similar development, in modern times and by modern methods. We shall see how a state of affairs not very unlike that which originally prevailed in what are now copyhold lands was in a single generation changed, somewhat as copyhold was changed, by a series of Acts of Parliament beginning with the Irish Land Act of 1870, and reaching its completion—for the present at any rate—in the Land Purchase Acts of 1903 and 1909.

The object common to the series of Acts passed during the last forty years, which is sometimes called the Irish land code, is the extension of the common law rights of agricultural tenants in Ireland. Those rights, in the absence of special customs, had been governed since the time of James I. by the English common law rules (*see* the *Case of Gavelkind*, Rep. 134); but the conditions actually prevailing in the two countries were widely different. Ireland was a country of small holdings, the tenant's legal interest in which was capable of speedy determination, for the most part held under yearly tenancies. But in practice, tenants and their families were often allowed to continue so long in occupation of their holdings that they came to have a sort of customary right to the occupation; and in parts of the country custom allowed the tenant to deal with this privilege of occupancy by way of sale.[1] Moreover, it was an almost universal practice that improvements to the holding were made by the tenant, not the landlord; yet these by the common law rules became the property of the landlord, who was under no *legal* obligation to compensate the tenant for them on ejecting him from his holding, and who could increase the rent as the tenant's improvements made the holding more valuable. To remedy this state of things; to legalize the customs referred to as favourable to the tenant, among which the *Ulster custom* was chief; to put all tenants of agricultural holdings on a similar footing to those subject to these customs; to make permanent a tenant's interest in his holding, and enable him to have the fair rent for his holding judicially determined; and finally, to assist tenants in purchasing their holdings from their landlords—these were the intentions of the Irish Land Acts of 1870, 1881, 1887, and 1896, the Land Purchase Acts of 1885 and 1891, and the Irish Land Acts (mainly concerned with land purchase) of 1903 and 1909.

I. It will be well to preface a summary of these by some notice of the Irish Landlord and Tenant Act, 1860 (Deasy's Act). This consolidated the existing law of landlord and tenant, and made some important changes in procedure: and it created one of the radical differences between English and Irish law on this subject, viz., that the relationship of landlord and tenant was in Ireland thenceforth *based, not on tenure, but on contract*, no reversion being necessary for the existence of such relationship. (Sect. 3.) The Act (23 & 24 Vict. c. 154) may be divided as follows:—

1. The formation, and certain incidents, of *the contract of tenancy*, which is declared to exist whenever one party agrees to hold land from or under another in consideration of rent.

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[1] Compare the statement of Bewley, J. (*Markey* v. *Lord Gosford*, 31 I. L. T. R. 97): "Prior to the passing of the Act of 1870, the tenant of a holding subject to the Ulster custom claimed to have an interest in his holding over and above his mere legal tenancy, and although this interest had no legal sanction it was almost universally recognised. The tenant was regarded as an owner, and not a mere hirer of land, and the farm was considered to be fully as much a part of the family property of the tenant as the reversion was of the family property of the landlord."

It may be express or implied from the conduct of the parties payment of rent being evidence, but not irrebutable evidence, of a contract of tenancy. (*Hurly* v. *Hanrahan*, I. R. 1 C. L. 700.) If express, and for a greater period than from year to year, it must be made *either* by deed, *or by writing* signed by the landlord or his agent authorised in writing. (Sect. 4.) A letting from year to year may be made by parol. (*Bayley* v. *Conyngham*, 15 I. C. L. R. 406.) The main incidents treated of are: (*a*) *fixtures* and *emblements*. A tenant, if there be no contrary agreement, may remove his fixtures during the tenancy, or within two months of its determination by an uncertain event. (Sect. 17.) And on such a determination of his tenancy, if he holds at a rack-rent, he may, in lieu of his right to emblements, continue his occupation till the last gale-day of the current year of his tenancy. (Sect. 34.) (*b*) As to *waste:* sects. 26—31 deal with certain acts in the nature of waste, and the tenant's rights as to committing them; and a summary jurisdiction to prevent waste is given to justices of the peace. (Sects. 35—37.) (*c*) As to *covenants implied* in the contract: on the landlord's part, absolute covenants for title and for quiet enjoyment (sect. 41); on the tenant's part, covenants to pay rent and taxes, keep in repair and so deliver up the premises, subject (if there is no *express* repairing covenant) to a right of surrender in case of their accidental destruction. (Sects. 40 and 42.) Express covenants on these matters exclude the implied covenants.

2. *Surrenders and assignments* by tenants. These may be made either by deed or by note in writing (sects. 7, 9), or may take place by operation of law. If there be an agreement in writing prohibiting assignment or sub-letting, any assignment or sub-letting without the landlord's written consent, testified by his or his agent's joining in or endorsing the instrument of assignment, is absolutely void (sects. 10, 18), and passes no interest to the assignee or sub-tenant, not even an interest by estoppel against the assignor himself. (*Gillman* v. *Murphy*, I. R. 6 C. L. 34.) However, an Act of 51 & 52 Vict. c. 13, s. 1, in cases of the assignee applying to have a fair rent fixed, allows the landlord's consent to the assignment to be established by *any* evidence satisfactory to the Court. And sect. 11 of the Land Act, 1896, provides, with reference to sub-lettings by middlemen without consent, that on an application by the sub-tenant to have a fair rent fixed, proof that the superior landlord knew of the sub-letting and took no steps to enforce his contract shall be sufficient proof of his consent. Nor do these sections invalidate an assignment *by will*. (*Foley* v. *Gallagher*, 2 L. R. Ir. 35, 389.)

3. *Procedure.* Sects. 45—102 deal with actions for rent and actions of ejectment. An action of ejectment for non-payment of rent may be brought when at least one year's rent is in arrear. Under sects. 70, 71, a tenant who has had a decree given against him in an action of ejectment may be restored to his holding on applying to the Court within six months from the execution of the decree, and paying the rent with arrears and costs. (And see sect. 7, Land Act, 1887, as to service of a "caretaker notice" being made equivalent to execution.) Further, if the tenancy be one to which the Land Acts apply, the tenant may redeem it by the payment of two years' rent (whatever be the amount of rent due), and the landlord can recover the remainder of the arrears as a debt due by the tenant, but not by ejectment or distress. (Sect. 16, Land Act, 1896.)

II. The first of the Land Acts proper is the Landlord and Tenant (Ireland) Act, 1870 (33 & 34 Vict. c. 46). This, which, like the succeeding Act, applies only to agricultural and pastoral tenancies, was the first to recognise an *occupation interest* in land. It legalized the Ulster custom and similar usages; and it gave tenants not subject to these a right, on quitting their holding, to be compensated for their improvements, and to be compensated for "disturbance" in their holding by act of the landlord. It has, of course, been largely superseded by later legislation: such of its main provisions as are noteworthy may be summarized under these heads:—

1. *Legal force given to customs formerly not recognised by law*, a number of varying usages which had long existed, chiefly in Ulster, permitting a tenant to deal with his customary interest. Sects. 1, 2 of the Act now declare this Ulster custom and similar usages legal, and enforceable "in manner provided by the Act"; however, curiously enough, the Act provides no means of enforcing the custom. The essential elements in such a custom have been judicially said to be:—(*a*) the tenant's right to sell his interest; (*b*) to have the purchaser recognised by the landlord, if there be no reasonable objection to him; (*c*) and to have his tenancy transferred to such purchaser. (*Per* Porter, M. R., *M'Elroy* v. *Brooke*, 16 L. R. Ir. 74.) To these may be added (*d*) the right of a tenant to continue in undisturbed possession so long as he pays his rent. The sections also provide that a landlord may purchase this custom from the tenant, and it then ceases to attach to the holding.

2. *Compensation for disturbance.* Sect. 3 provides that a tenant, not entitled under the foregoing customs, shall

be entitled to such compensation from the landlord, if "disturbed" by him, as the Court shall think just. "Disturbance" is not defined; but a tenant may claim compensation as soon as he has been served by his landlord with a notice to quit or an ejectment; it would seem that the Court would decide on the facts of each case whether a disturbance had taken place. (*Fitzsimons* v. *Clive*, 12 I. L. T. R. 12.)

3. *Compensation for improvements.* Sect. 4 enacts that a tenant, not claiming under the customs, may, on quitting his holding, or being ejected for non-payment of rent, claim compensation for improvements made by him or his predecessors in title, except in certain specified cases. "Predecessors in title" mean not necessarily predecessors in the *same* title, but "those who have transmitted to one another their respective tenancies or titles to the possession of a holding, whatever those tenancies or titles may be." (*Adams* v. *Dunseath*, 10 L. R. Ir. 109.) Contracts not to improve the holding, or not to claim for improvements, are declared void. Sect. 70 defines "improvements" as (*a*) works adding to the land's letting value; and (*b*) unexhausted tillages, manures, and like farming works. As the law now stands (sect. 5, Act 1870, amended by Land Act, 1896, s. 1 (10)), improvements are presumed to have been made by the tenant, *except* (*a*) they were made before 1850; or (*b*) the estate is "English-managed"; or (*c*) the Court is satisfied from all the circumstances that the improvements were not made by the tenant; or (*d*) the improvements were made previous to a sale of the holding (before 1 Aug. 1870) to the landlord. But it must be remembered that if the holding be subject to the Ulster custom, there is a *general* presumption that the improvements belong to the tenant.

4. *Exclusions from the Act.* From the provisions as to compensation for disturbances are excluded tenants of demesne lands, pasture lettings, and "town-parks," which may now be defined as holdings in the outskirts of a town, let to residents in the town, having an increased value as accommodation land, and not merely let and used as ordinary agricultural or pastoral farms. (Cp. Land Act, 1881, s. 58; Act of 1887, s. 9; Act of 1896, s. 6.) From the provisions both as to disturbance and improvements are excluded tenants of lettings for temporary convenience, lettings in conacre (*i.e.*, a letting of a small portion of land for a single crop of potatoes or other tillage, which is really a sale of a *profit à prendre*), and lettings for agistment. (Sect. 15.)

III. By far the most important of these Acts is the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49). Its aim was to put a tenant (not under an existing lease) who takes advantage of its provisions virtually in the position of owner of his holding, and to reduce the landlord's position to that of a rent-charger, though with special rights and remedies. It was meant to give tenants what were popularly called "the three F's"—fixity of tenure of the holding, fair rent, and free sale. And it created a new judicial body, called the *Land Commission*, with jurisdiction to hear and determine all matters of law or fact arising under the Act—a concurrent primary jurisdiction also existing in the Civil Bill Courts (the County Courts of Ireland), with right of appeal to the Land Commission. The head of this Commission, the Judicial Commissioner, ranks as a puisne judge of the High Court; and the Land Act, 1903, gives the powers of a Judicial Commissioner also to one of the other chief commissioners. Assistant commissioners are appointed by the Lord Lieutenant with the approval of the Treasury. This body is, by the Land Purchase Act, 1891, made perpetual.

The main provisions of the Act (as now amended by the Land Act, 1896) may be considered under the following heads:—

1. *Scope and application* of the Act.
2. Tenant's *powers to dispose of his holding*.
3. Creation and incidents of a *statutory term*.
4. Tenant's rights to have a *fair rent* fixed.

1. The question of the scope and application of the Act, and of the exclusions from it, is complicated. It makes a distinction between "present" and "future" tenancies. (Sect. 57.) A *present tenancy* is one existing at the passing of the Act (22nd August, 1881), or created before 1st January, 1883, in a holding in which a tenancy existed at the passing of the Act. Any other is a *future tenancy;* but now, by agreement in the prescribed manner, the landlord and tenant may make any tenancy a present tenancy. (Sect. 17, Act 1896.) Formerly, in the case of tenants under *limited owners*, when the interest of a limited owner determined, the tenancies under his successor became new and future tenancies; but this is overruled by sect. 10 of the Act of 1896. As to the application of the Act to present and future tenancies respectively—it seems that the provisions as to disposition by the tenant apply to both present and future tenancies; those as to the statutory term apply to present tenancies, and to future tenancies *only* in case the landlord and tenant have agreed to an increase of rent (sect. 4); the provisions as to fair rent apply solely to present tenancies.

Even of present tenancies many are excluded from the Act. These are specified in sect. 58, as amended by sect. 5, Act

1896, and are, besides those tenancies not substantially agricultural or pastoral, tenancies in demesne lands, town-parks, and several others. (See the sections, on which there is a mass of decisions.)

Tenancies may also be excluded by agreement between landlord and tenant for a lease (for thirty-one years or over) approved of by the Court, called a *judicial lease*. (Sect. 10.) And a tenant, the rateable valuation of whose holding is not less than 150*l.* yearly, may contract himself out of the Act. (Sect. 22.)

2. One of the great objects of the Act was to give the tenant a power of disposing of his holding, by alienation *inter vivos* (sect. 1), or by bequest (sect. 3)—to put him, in fact, in a somewhat similar position to a tenant under the Ulster custom. Sect. 1 provides that the tenant of any holding to which the Act applies may sell his holding for the best price that can be got, subject to the regulations set forth in the Act. These regulations provide that notice [1] of intention to sell shall be given to the landlord, who thereupon has any one of three courses open to him. He may (*a*) consent to the sale. (*b*) He may "pre-empt," *i.e.*, elect to purchase the holding himself at its "true value"; the Court decides what is the *true value* of the tenancy if landlord and tenant *bonâ fide* disagree as to it; and this has been held to be not the value of the holding in the open market, but "what, having regard to the interests of landlord and tenant respectively, is the true estimate of price *between them*." [2] (*Per* Sullivan, M. R., in *Adams* v. *Dunseath*, 10 L. R. Ir. 143.) (*c*) He may object to the purchaser on reasonable grounds, and the reasonableness of his objection will, in case of dispute, be determined by the Court; if, however, the improvements on the holding have been made and maintained by the landlord, his objection is conclusive. There are also regulations as to the satisfaction of arrears of rent out of the purchase-money. A tenant holding under the Ulster custom may, if he choose, sell under that custom and not under the Act (sect. 1 (12)); and if he does so, the landlord has no

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[1] See, as to the necessity for service of notice of intention to sell by a tenant who has signed an agreement for the purchase of his holding under the Land Purchase Acts, but whose holding is not yet vested in him, *In re Lynders*, (1910) 1 Ir. R. 231.

[2] The true value is related to the "open value" as the fair rent to the "competition rent." (*Curneen* v. *Tottenham*, (1896) 2 Ir. R. 362.) It may be more than the tenant could get as compensation for disturbance. (*Johnson* v. *Courtney*, 31 I. L. T. R. 117.)

right (*b*) of pre-emption. The tenant has also a right to mortgage his holding to one person only, and in that case the landlord's only right is (*c*). (Sect. 19, Act 1896.)

Sect. 3 provides that if a tenant bequeaths his tenancy, his legatee shall have the same right to be accepted by the landlord as a purchaser would have. If a tenant dies intestate, his personal representatives may nominate one of the next of kin to succeed to the tenancy; if there are no next of kin, the tenancy goes to the landlord subject to the tenant's debts.

3. Another great object was to give fixity of tenure. This is attained by enabling a tenant to enlarge his interest into *a statutory term*, which is virtually an interest in a tenancy in perpetuity, subject to having the rent revised at intervals of fifteen years, and to *statutory conditions*, on breach of which the landlord may determine it by ejectment founded on notice to quit. A statutory term may be created (*a*) by agreement for an increased rent under sect. 4 (1); (*b*) by having a fair rent fixed, either by the Court or by arbitration (sects. 8 (1), 40); (*c*) by filing in Court an agreement for a judicial rent. (Sect. 8 (6).) During this term the rent cannot be increased, except by agreement in respect of capital laid out by the landlord. The conditions to which it is subject, and on breach of which it may be determined, are (sect. 5):—(*a*) payment of rent by the tenant; (*b*) tenant not committing persistent waste; (*c*) tenant not sub-dividing or sub-letting without consent—such sub-letting is absolutely void and passes no interest to the sub-lessee (*O'Kane* v. *Burns*, (1897) 2 Ir. R. 591); (*d*) tenant not doing any act which vests his interest in an assignee in bankruptcy; (*e*) tenant not opening a public-house on the holding without consent. The landlord is given rights of entry for certain purposes, and a restricted right of resumption. It is to be noted that the statutory term can now outlast the interest of the landlord under whom it is created. (Sect. 10, Act 1896.)

4. Finally, tenants were enabled to have fair rents for their holdings judicially fixed. Sect. 8 provides that the tenant, or the landlord in case he has demanded an increase of rent which has been refused, may apply to the Court to fix a fair rent, called a *judicial rent*. The Court is to fix this fair rent on considering (sub-sect. 9) all the circumstances of the case, holding, and district, and having regard to the interest of landlord and tenant respectively, which does not, however, mean that either "competition value" or "occupation interest" is to be a ground of deduction. (*Ripley* v. *Macnaghten*, (1899) 2 Ir. R. 446.) It is particularly provided that no rent shall be made payable by the

tenant in respect of improvements made by him or his predecessors in title, unless these have been already compensated. The Land Act, 1896 (59 & 60 Vict. c. 47), now requires the Court, on fixing this fair rent originally or on appeal, to record in the form of a schedule full particulars as to improvements, the condition of the holding, and generally all matters taken into account in fixing the fair rent—to record, in short, the grounds of its judgment. (Sect. 1.)

The leading case of *Adams* v. *Dunseath* (10 L. R. Ir. 109) has decided that "improvements" here must have the same meaning as in the Land Act, 1870—*i.e.*, must mean improvement works, not increased letting value—and that the reduction of rent in respect of them is to be only in proportion to the amount of labour and capital actually expended in making them. In a case affecting the same holding, on the expiration of the first statutory term (*Adams* v. *Dunseath*, No. 2, (1899) 2 Ir. R. 504), a majority of the Court of Appeal laid down the following principles as to fixing the fair rent:—(*a*) The tenant is entitled to a fair return by way of annual allowance in respect of the present capital value of his improvement works, which may be estimated by way of percentage on such capital value. (*b*) If. after making this percentage, there is still a surplus of increased letting value, it is within the exclusive jurisdiction of the Land Commission to determine whether. and in what proportions, such surplus shall be divided between landlord and tenant; in making such division, it will have regard to all the matters mentioned in sect. 8 (9) of the Act of 1881, and will treat the latent and dormant resources of the soil, as let by landlord to tenant, as the property of the landlord, and the development of those resources by the tenant as the act of the tenant. "English-managed" estates are excluded from the benefits of the section.

IV. All later Land Acts may be said to be amendments and extensions of the Act of 1881, and in particular (*see* Appendix C.) of provisions contained in it for assisting tenants to purchase the fee simple of their holdings. The Land Act, 1887 (50 & 51 Vict. c. 33), enabled leaseholders who would, under sect. 21, Act 1881, at the expiration of their existing leases be deemed in the position of tenants from year to year of "present tenancies," to take the benefits of the Act of 1881. It enabled them, in fact, to anticipate their future rights. (Sect. 1, and sect. 15, Act 1896.) And the Redemption of Rent Act, 1891 (54 & 55 Vict. c. 57), enables lessees under long terms, and grantees in fee farm, to have their rents redeemed by advances from the Land Commission, or, if the landlord will not consent to that, to have a fair rent fixed. In fixing such fair rent the grantee in fee farm has now practically the same rights as an ordinary tenant, as to exemption from rent on improvements. (Sect. 14, Act 1896, supplementing *Mairs* v. *Lecky*, (1895) 2 I. R. 479.)

An attempt has been made by the Town Tenants (Ireland) Act (6 Edw. VII. c. 54) to give tenants of houses, shops, and other buildings *in towns*, rights analogous to those given to agricultural tenants by the Act of 1870, in regard to compensation for improvements and disturbance. Such a tenant may, on quitting his holding, claim from his landlord compensation in respect of all improvements made by him or his predecessors in title, which add to the letting value of the holding (sect. 1); and the amount of such compensation is in case of dispute to be determined by the County Court. Compensation for disturbance may be claimed (sect. 5) if the landlord without sufficient cause (*a*) determines the tenancy; (*b*) refuses a renewal thereof; (*c*) demands an increased rent in respect of tenant's improvements. This section, however, applies only to houses, shops, and other buildings occupied wholly or to a substantial extent for trade or business purposes, and held (1) under yearly tenancies created after the passing of the Act; or (2) under leases made after the Act for not less than thirty-one years or for life or lives; or (3) under contracts of tenancy existing before the passing of the Act at a rent of not less than 100*l*. yearly. If the tenant wishes to claim for improvements made *after* the Act, he must give the landlord notice of his intention to make them.

APPENDIX C.

IRISH LAND PURCHASE.

As stated in former editions of this work, a series of Land Purchase Acts has been passed, intended to assist the sale of Irish agricultural holdings from landlords to their tenants. The first effective step in this direction was taken by the Land Purchase Act, 1885, the "purchase clauses" in the Land Acts of 1870 and 1881 having little practical result. Modifications in the scheme of purchase established by that Act were made by the Acts of 1891 and 1896. But the more recent and important Irish Land Act, 1903 (3 Edw. VII. c. 37), has so largely increased the facilities for purchase that we may treat it as a new point of departure; it therefore seems desirable to give some account of its provisions, although the details of this complicated subject are beyond our limits.

The common characteristics in all recent schemes of Irish land purchase are that the State, through the Land Commission, advances the purchase-money to the landlord, and that the purchasing tenant repays this advance with interest to the Commission by annual instalments (called the *purchase annuities*); the amount of each instalment is in practice less than the rent previously paid. Under the Act of 1891 this purchase-money was not paid to the landlord in cash, but by the issue to him of guaranteed land stock. In order to be satisfied that the holding was a sufficient security to the State for the advances, the Land Commission had to inspect it; and in order to be satisfied of the vendor's right to receive the money, they had to investigate his title fully. The principal changes made by the Act of 1903 in the system are (1) the price is payable in cash [1]; (2) the vendor also receives a "bonus" from the State; (3) sales under the Act are to be made, not of separate holdings, but of "estates"; and (4) an attempt is made to simplify and cheapen the investigation of title. Under this Act, however, as formerly, sale remains a voluntary process [1]; the questions whether a sale shall take place at all, and at what price, are matters of agreement and bargain between landlord and tenant. But whereas it was formerly a matter of discretion with the Land Commission as to whether they would sanction an advance, this is in many cases no longer so; if the sale falls within certain conditions, and if the Commission have declared the subject-matter of the sale "an estate," the Commission must sanction the advance.

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[1] Note that under sect. 3 of the Act of 1909 the issue of land-stock may be resumed in case of "future" purchase-agreements.

We shall now shortly consider the various steps in this process in their order.

I. *The Vendor.*—Without attempting an exhaustive enumeration of those persons who, as landlords, may sell to their tenants under the Land Purchase Acts, it is sufficient for our present purpose to say that they include the following:—(*a*) An owner in fee simple or fee farm, or a person having a power of appointment over the fee; (*b*) an owner of a lease for lives or years renewable for ever, or an owner entitled to a lease for years whereof at least sixty years are unexpired; (*c*) a tenant for life of any of the foregoing interests under a settlement, or a person having the powers of a tenant for life under the Settled Land Acts; (*d*) a trustee for sale or with a power of sale of any interests mentioned under (*a*) and (*b*); (*e*) the Land Judge, in certain cases; (*f*) a mortgagee in possession, with a power of sale, of any interests mentioned under (*a*) and (*b*).

II. *The Purchaser.*—Under previous Land Purchase Acts, a sale of a holding could only be made to a tenant of that holding. The Act of 1903 enlarged the class of persons who may purchase by including (sect. 2) the tenant of another holding on the same estate, or the son of such a tenant, or the tenant of a small holding (under 5*l*. in rateable value) in the neighbourhood of the estate, or a tenant who has been evicted from a holding within twenty-five years before the passing of the Act. The class is further enlarged, as regards sales after 1909, by sect. 17 of the Act of 1909.

III. *Subject-matter of Sale.*—That which is transferred from the landlord to the tenant is the *holding*, or, more correctly, the interest in that holding of the landlord and those whom the landlord (if a limited owner) represents; and all interests superior to the landlord's being redeemed out of the purchase-money, the tenant-purchaser acquires the fee simple. It must be noted, however, that (*a*) this holding which may be purchased by a tenant is not necessarily the holding which he previously occupied (sect. 2, *supra*); (*b*) only estates consisting substantially of *agricultural* (or pastoral) holdings are capable of being purchased under the Act; (*c*) but if a holding be substantially agricultural or pastoral, there are not the same *exclusions* from this Act as from the previous Land Acts, *e.g.*, future tenancies, town-parks, and demesne-lands may be purchased under this Act; but (*d*) the purchase-provisions of this Act are, strictly speaking, applicable to the sale, not of single holdings separately, but of *estates*. (Sects. 1, 98.) Therefore, before a sale can be made, an order must be obtained from the Commission declaring the quantity of lands which it is proposed to sell to be "an estate." The duties of the Commission under this Act are specially assigned to a new department of the Commission called the *Estates Commissioners*. (Sect. 23.)

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[1] Certain limited powers of compulsory purchase are, however, given to the Land Commission by Part IV. of the Act of 1909.

Sales under the Act may take one of two forms: (i.) The most common, sales direct by landlord to tenants of holdings declared by the Commission to constitute collectively an estate; or (ii.) sales of an entire estate by the landlord to the Commission, with a view to its being re-sold by the Commission to the tenants. (Sect. 6.) The procedure in the latter case is more complicated, and, as it is likely to be less usual than the former, it will not be further noticed here.

IV. *Agreement for Sale.*—The agreement for the sale and purchase of a holding *must* state the price; it *should* also state whether the sporting rights over the holding are to be conveyed to the tenant-purchaser or reserved to the vendor: if this is not specified, such rights will vest in the Commission, who may subsequently deal with them.

This agreement, together with a statement on the part of the landlord called an originating application, is filed with the Land Commission. Their duties thereupon are twofold:—(1) They must consider whether the statement discloses that the landlord has a *primâ facie* title to sell. Under sect. 17 all that is necessary in that regard at the present stage is (*a*) to give *primâ facie* evidence that he comes within one of the classes of vendors mentioned above; and (*b*) to satisfy the Commission that he or his immediate predecessor in title has been in receipt of the rents and profits of the land for the six years immediately preceding his proposal for sale.[1] The Commission are then authorised to treat him as owner for all purposes other than the distribution of the purchase-money; *i.e.*, a complete investigation of his title is postponed until after the transfer to the tenants. (2) If satisfied on this preliminary question of title, and if the subject-matter of the proposed sale is declared fit to be regarded as an estate, there arises the question as to the Commission sanctioning an advance of the purchase-money.

V. *Sanction of Advance.*—The duty of the Land Commission to sanction an advance for the purchase of a holding is in some cases *mandatory*, in others *discretionary*.

1. It is mandatory where the holding is subject to a *judicial rent* fixed or agreed on:—

(*a*) Since 1896, if the purchase-money is not less than $21\frac{1}{2}$ or more than $27\frac{2}{3}$ times the rent;

(*b*) Before 1896, if the purchase-money is not less than $18\frac{1}{2}$ or more than $24\frac{1}{2}$ times the rent.[2]

2. It is discretionary if the holding is not a judicial tenancy, or if the price does not come within the conditions above mentioned. In such cases the Commission may sanction the advance, if they are satisfied with the security, and if, after giving all persons interested an opportunity of being heard, they consider the price equitable.

VI. *Vesting Order.*—The advance having been sanctioned, and such evidence given of the boundaries and extent of the holdings as the Commission think necessary, an order is made vesting the ownership of the holdings in the tenant-purchasers. During the interval between the signing of the agreement and the making of this order, the tenant, instead of rent, is liable to pay interest on the purchase-money to his landlord through the Commission, at a rate which will generally be specified by the agreement.

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[1] This *primâ facie* investigation of title is, under Rules made in November, 1907, to be performed by counsel for the vendor, who is to certify that in his opinion the requirements of sect. 17 have been fulfilled, and also that the lands have been sufficiently identified. Such certificate will "satisfy the Commission."

[2] This is the practical result of sects. 1 and 45: any case satisfying these conditions is said to be "within the zones." The price is stated in the agreement as a lump sum, but the negotiations usually go on the basis of a number of years' purchase of the rent.

VII. *Making of Advance.*—The purchase-money is not advanced direct to the landlord, as he has not yet fully proved his title to it, and as in most cases various persons will be entitled to different interests in it. The Commission pay it into the Bank of Ireland and make an order attaching to the money all claims which previously attached to the landlord's interest in the land. (Sect. 24.)

VIII. *Repayment by Purchaser.*—This advance is repayable by the tenant-purchaser to the Commission by a series of annual payments called purchase-annuities, which are charged on the tenant's interest in the land purchased. Sect. 45 fixes the amount of the annuity at 3*l.* 5*s.* for every 100*l.* advanced.[1] The purchaser may at any time redeem the outstanding future annuities. (Sect. 46.)

IX. *Payment to Vendor.*—For the purpose of ascertaining who is entitled to the purchase-money, the landlord's title is at this stage investigated by the Commission (without, if possible, causing expense to the persons entitled), and the money is distributable among those whose claims to it are ascertained.[2] Not only will the landlord (vendor) receive that portion of the purchase-money to which he is entitled, after providing for claims, but also a "bonus." (Sect. 48.) In order to aid the sale of estates, the Commission are empowered to pay the vendor an amount equal to 12 per cent. on the purchase-money of the estate. (But *see* now sect. 6, Act 1909.) It is to be noted, however, that if (*a*) the estate is insolvent as to income (*i.e.*, so encumbered that the vendor is not entitled to receive for his own use any part of the rents or profits); or if (*b*) the percentage is payable in respect of an estate sold by the Land Judge, the bonus is not paid to the vendor, but added to the purchase-money. Where it is payable to the vendor, he is entitled to it for his own use and benefit, notwithstanding that he is a tenant for life; *i.e.*, it is not like capital money under the Settled Land Acts. (4 Edw. VII. c. 34, s. 3.)

From the date of the vesting order the Commission pay the landlord interest at $3\frac{1}{2}$ per cent. on the purchase-money till distribution; the rate of interest may be reduced in the case of any person entitled, if by his default his title is not established within twelve months. (Sect. 25.)

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[1] $3\frac{1}{2}$ per cent. in case of "future" purchase-agreements, under sect. 1 (1), Act of 1909.

[2] This distribution is made by an order of the Judicial Commissioner (sitting in Court or in Chamber), before whom there is brought a schedule setting forth the various persons entitled to the money, in due order of priority; and this schedule, if approved by him, regulates the order in which the money is to be paid out.

X. *Restriction on Rights of Tenant-Purchaser.*—We have only to notice, further, that the purchaser of a holding is restrained from sub-dividing or letting it, and (partially) from mortgaging it. (Sect. 54.) He may not sub-divide or sub-let without the consent of the Commission, who, if he does so, may order the holding to be sold. (See *In re Geoghegan*, [1918] 1 I. R. 188.) Nor may he mortgage or charge the holding or any part of it for more than ten times the amount of the annuity payable in respect of the holding or that part; any mortgage or charge exceeding this amount is void as to the excess. This does not affect a judgment-mortgage: *Re Roulston*, [1909] 1 I. R. 306. If the result of a disposition taking effect on death, or of an intestacy, would be to cause the holding to become vested in more than one person, the Court may either direct a sale within twelve months, or nominate some person interested as the proprietor of the holding, providing for the satisfaction of the claims of other persons interested by charging those claims on the holding or otherwise.

APPENDIX D.

REGISTRATION IN IRELAND.

THERE are in Ireland two systems of registration: (*a*) *registration of assurances* (and of judgments), being a record of dealings with land; and (*b*) *registration of title*, being a record of the ownership of land. The former system is similar to, but somewhat more extensive than, that prevailing under the English Registry Acts in the so-called Register Counties. The provisions of the latter system are similar to those which the Land Transfer Acts, 1875 (38 & 39 Vict. c. 87) and 1897 (60 & 61 Vict. c. 65), enacted for England, with this important difference: that whereas registration under those Acts has hitherto been largely voluntary, and in practice comparatively rare, there is in Ireland, under the Local Registration of Title Act, 1891 (54 & 55 Vict. c. 66), a large class of lands the ownership of which must be registered, viz., lands sold and conveyed to or vested in a purchaser under the Purchase of Land (Ireland) Acts (see Appendix C.), subject to a charge for repayment of an advance of purchase-money. The registration of all other land is voluntary. When land is registered under the Registration of Title Acts, it ceases to be subject to the ordinary law as to registration of assurances. Since, however, *all* other land in Ireland is so subject, we shall first briefly notice the provisions of the Irish Registry Acts.

I. The chief of these are the 6 Anne, c. 2 (Ir.), with various amending Acts, and (as to judgments) 13 & 14 Vict. c. 29. The statute of Anne provides for the registration, in a central office established by it, of all deeds, conveyances, and wills,[1] affecting land (sect. 3), except leases for years not exceeding twenty-one, accompanied by actual possession. (Sect. 14.) Such registration is effected by enrolling in the Registry of Deeds a "memorial" of the instrument in question, *i.e.*, a statement of its date, parties and witnesses, with their descriptions and residences, and of the lands affected by the instrument and their local situation. (Sect. 7.) This memorial is to be executed by a grantor or grantee under the instrument, and attested by two witnesses, one of whom was a witness to the original deed, and this latter witness is to prove, by affidavit filed along with the memorial, the execution both of memorial and deed. (Sect. 6.) The *effect of such registration* is to give registered instruments priority, according to the time of their registration, against all other assurances of the same land. (Sect. 4.) And unregistered assurances of lands comprised in a registered assurance are to be deemed fraudulent and void, both against the registered assurance and against creditors having a claim against the lands in question. (Sect. 5.) Generally speaking, a registered assurance will have priority over a *previous unregistered* assurance of the same lands, *unless* the party setting up the registered instrument has *actual notice* of the previous instrument, in which case equity deprives him of his statutory priority. (*Le Neve* v. *Le Neve*, 1 Ves. 64; *Mill* v. *Hill*, 3 H. L. C. 828.) As to the effect of registration in excluding the doctrine of tacking, *see p.* 218, *supra*.[1]

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[1] Since, however, unregistered wills were not declared void against subsequent purchasers, wills are in practice seldom registered. (*Fury* v. *Smith*, 1 H. & B. 759.)

It is to be noticed that non-registration of an instrument which should have been registered does not *invalidate* that instrument, but merely renders it liable to be defeated by a subsequent registered instrument; it is nevertheless good, *e.g.*, as between grantor and grantee. (*Jones* v. *Gibbon*, 9 Ves. 407.) Nor does an instrument (*e.g.*, a voluntary conveyance, at all events so long as none but volunteers derive under it) gain any additional intrinsic validity from being registered. (*In re Flood*, 13 Ir. Ch. 312.) This, however, must be taken subject to the qualification that certain statutes make registration essential to the validity of certain assurances; thus, *e.g.*, the Charitable Donations and Bequests Act (7 & 8 Vict. c. 97, s. 16) avoids conveyances of lands in Ireland for pious or charitable uses unless registered within three months of their execution (wills are excepted, but a devise of lands for charitable uses is void unless the testator lives three months after executing his will).

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[1] An equitable depositee of deeds, where there is no memorandum in writing, takes priority over a purchaser for value claiming under a subsequent deed without notice of the deposit. But if the deposit is accompanied by any memorandum amounting to an agreement to create an equitable charge on the lands, such memorandum must be registered. (*Re Burke's Estate*, 9 L. R. Ir. 24; and *Fullerton* v. *Provincial Bank*, (1903) A. C. 309.)

II. *Registration of Judgments as Judgment Mortgages.*—Since the Act 13 & 14 Vict. c. 29, the lands of a judgment debtor can, in Ireland, no longer be seized under a writ of *elegit.* There are now only two ways in which a judgment can be made available against a debtor's lands: (*a*) chattel interests in land may be taken under a writ of *fi. fa.*; (*b*) the judgment may be registered under this Act as a judgment mortgage.

Sect. 6 enacts (in substance) that when a judgment creditor shall know or believe that the judgment debtor is possessed of, or has a disposing power over, lands of any tenure, the judgment creditor may make, and file in the Court in which judgment has been entered up, an affidavit stating (*a*) the title of the cause, (*b*) the name and the usual or last known place of abode and the title, trade, or profession of the plaintiff and defendant, (*c*) the amount of the debt, damages and costs, (*d*) the nature of the judgment debtor's interest in the lands, (*e*) the county and barony or town and parish in which the lands are situate. An office copy of this affidavit is filed by the judgment creditor in the Registry of Deeds; and this filing effects a judgment mortgage, transferring the judgment debtor's interest in the lands to the creditor to the same extent as if a mortgage thereof had been duly made and registered at the time of registering the affidavit.

III. *Registration of Title.*—This was to some extent provided for by the Record of Title Act, 1865 (28 & 29 Vict. c. 88), which established a Record of Title Office for the registration of parliamentary titles to land, and of titles conferred by conveyances, and declarations of title made by the Landed Estates Court.[1] This Act, however, is now of comparatively slight importance.

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[1] This court was established in 1858, by the 21 & 22 Vict. c. 72, as successor to the older Encumbered Estates Court, and is now a branch of the Chancery Division. Its function was to facilitate the sale of the encumbered estates then so common in Ireland; and to take charge of them until sold, by appointing receivers. Any encumbrancer or owner of an encumbered estate can apply for a sale, which is preceded by an investigation of title to the lands, of the priority of charges existing upon them, and the rights of all persons in regard to them. A Landed Estates Court conveyance creates a certain and indefeasible title to whatever it purports to convey, against which no averment can be

The Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66), establishes a central registering authority in Dublin, and a local registering authority in each county in Ireland. (Sect. 4.) In these offices, the ownership of any lands purchased by tenants under the Land Purchase Acts, and subject to a charge for the repayment of purchase-money advanced under those Acts, *must* be, and the ownership of any other land *may* be, registered (sect. 22); and so long as land remains registered under this Act, the provisions as to registration of assurances do not apply to it. (Sect. 19.) If the original registration was voluntary, the owner may at any time have the land taken off the register. (Sect. 20.)

Where registration is declared to be compulsory,[1] no estate is acquired under any conveyance by any person until he is registered as owner of such land, and upon such registration the title relates back to the date of the conveyance, and any dealings with the land before registration have effect accordingly. (Sect. 25.) Land compulsorily registrable may be devised, but the devisee acquires no estate or interest until he is registered as owner. (*Torish* v. *Orr and Smith*, (1894) 2 Ir. R. 381.)

Voluntary registration is preceded by an investigation of the title by the registering authority, for the purpose of determining under which "kind of ownership" it shall be registered, and whether any "burdens" affect it. (Sect. 29.) There are two kinds of ownership which may be registered: (*a*) *full ownership, i.e.*, ownership in fee; and (*b*) *limited ownership, i.e.*, the ownership of a tenant in tail or for life. (Sect. 28.) "Burdens" or incumbrances are also of two kinds: (*a*) burdens which may affect registered land without the burdens being registered; these are enumerated in sect. 47, which see; and (*b*) burdens which may be registered as affecting registered land, which include incumbrances in general, and judgments. (*See* sect. 45.) Burdens rank in priority according to the time of their registration. (Sect. 49.)

The *effect of registration* is to vest the fee simple in the person registered as full owner, or in the person registered as limited owner and the other persons entitled under the settle-

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made. (Sect. 61 and *Re Tottenham's Estate*, Ir. R. 3 Eq. 529.) When a receiver has been appointed, it is now the duty of the Land Judge, with the assistance of the Land Commission, to offer the estate for purchase in the first instance to the tenants. (Sect. 40, Land Act, 1896; and *Re Owen's Estate*, (1897) 1 I. R. 200.)

[1] In cases of compulsory registration, the title to the tenant-purchaser's interest is not investigated, and the registration is "subject to equities."

ment collectively, subject to such burdens as may affect the land. (Sect. 30.) This ownership is evidenced by the delivery to the person entitled of a "land certificate" (sect. 31); and a deposit of this certificate as security for a loan has the same effect as a deposit of title deeds, *i.e.*, creates an equitable mortgage. (Sect. 81.) The register is then conclusive evidence of the title to the land (sect. 34), and upon it all transfers and devolutions will thenceforth appear, any instrument of transfer being ineffectual till it does appear on the register. (Sect. 36.) Charges on the registered land are to be made by an instrument of charge, which, when registered, has the effect of a mortgage by deed (sect. 40); when a charge is satisfied, the satisfaction is in like manner entered on the register, and the charge thereupon ceases to operate. (Sect. 42.)

It is important to note, that adverse possession gives no title to registered land until the person thereby claiming has obtained from the Court an order declaring his title, and ordering the rectification of the register accordingly. (Sect. 52.)

A separate register of *leasehold land* is to be kept. (Sect. 53.)

Generally speaking, no *trust* affecting registered land will appear on the register. (Sect. 63.)

Land registered as having been purchased by tenants under the Purchase Acts is to devolve and be administered like personalty. (Sects. 83—89.) Notwithstanding any testamentary disposition of the owner, it devolves upon his personal representatives like a chattel real (sect. 84); and they hold it, as they do personalty, in trust for the persons beneficially entitled under the deceased owner's will, or by way of intestate succession. (Sect. 85.) All canons of descent, and rules as to curtesy and dower, are abolished with respect to such land; but the word *heirs*, used as a word of limitation in an instrument executed before the Act, is to have the same effect as if the Act had not passed; and in an instrument made after the Act, it is to be construed as meaning the persons beneficially entitled by way of intestate succession to the ancestor's personal estate. (Sect. 89.) Under 3 Edw. VII. c. 37, s. 54 (4), any mortgage or charge on such lands is to be void if not registered as a burden within three months of its execution if made *inter vivos*, or, if created by will, within six months of testator's death.

APPENDIX E.

SHIPS.

Ships are a species of personal property, and are therefore subject, in the absence of other provisions, to the ordinary rules relating to the acquirement, transmission, and devolution of goods. But they are also subject, by reason of their important and peculiar character, to a large body of special rules, and it is therefore necessary to consider briefly the mode in which interests in ships can be dealt with and disposed of. For, as was said by Turner, L. J., in *Hooper* v. *Gunn* (L. R. 2 Ch. App. 282), "a ship is not like *ordinary* personal property; it does not pass by delivery, nor does the possession of it prove the title to it; there is no market overt for ships."

The effect of statutory enactments has been to put ships, as far as the mode of dealing with them is considered, in a position very like that of land, the title to which has been registered. A Registry of Shipping has been established in the ports of the United Kingdom; and every ship, with the exception of small coasting vessels or vessels engaged in inland navigation, must be registered therein if it is to be recognised as or have the privileges of a British ship. (Merchant Shipping Act, 1894, s. 1.)

Moreover, there exists a restriction as to the persons who can be considered as owners of a British ship—a restriction such as no longer exists in the case of any other kind of property under English law. Just as formerly an alien could not hold land in England, so still an alien cannot be owner of a British ship. (*See* Naturalisation Act, 1914, s. 17 (3).) The persons qualified for such ownership are either—(*a*) British subjects, whether they have become such by birth, naturalization, or denization, or (*b*) a body corporate, under the law of some portion of the British Empire, and having its principal place of business within the empire. (Sect. 1.)

There is a further restriction as to the number of persons who can be registered as owners of any one ship; this number is fixed at 64. This does not mean that no more than 64 individuals can possibly be beneficially interested in a ship. The provision simply is that not more than 64 individuals shall be *registered*, and that a ship shall be considered as divisible into not more than 64 shares; but this provision is not to affect the beneficial title of any number of persons or of any company, claiming through the registered owners. (Sect. 5.)

The first entry of a ship upon the register is preceded by a survey, for the purpose of ascertaining its tonnage, and by a declaration as to the ownership, which is evidenced by a certificate of the builder. (Sects. 6, 8 and 9.) The fact of registry is then evidenced by a *certificate of registry*, containing the name of the ship, the port at which she is registered (called the *port of registry*), particulars as to her tonnage, build, and origin, the name of the owners and of the master. (Sect. 14.) Every subsequent change in the ownership of the vessel is indorsed on this certificate, which is finally delivered up to the registry authorities on the ship being lost or ceasing to be a British ship. (Sect. 20.)

Transfers of Ships.—A ship being thus entered upon the register, a legal transfer either of the whole ship or of any share therein—*i.e.*, a transfer entitling the transferee to be put on the register in place of the transferor—can be made only between persons qualified as above stated to own a British ship, by means of a *bill of sale* duly attested; and it must be evidenced by the requisite entries and alterations in the register. This bill of sale, or instrument of transfer, is to be in the form set out in the schedule to the Act, and attested in the manner therein provided. (Sect. 24.) It is, moreover, to be accompanied by a *declaration of transfer*. (Sect. 25.) This is a declaration made by the transferee, containing a statement of his qualification to be the registered owner of a British ship, and a further statement that no unqualified person is entitled, legally or equitably, to the ship or a share therein. Upon the bill of sale and the declaration of transfer being produced to the registrar at the ship's port of registry, he makes the requisite alteration in the registered ownership by entering the name of the transferee as the new owner, and indorses on the bill of sale a memorandum of such entry.

Devolution.—The devolution of ships, on the death or bankruptcy of the owner, is governed by the rules applicable to the devolution of other personal property; but the person succeeding to the rights of ownership acquires no power of disposition over the ship until his rights are authenticated by the proper entry in the register. As on a transfer by bill of sale, so here, the successor must make a *declaration of trans-*

mission, containing similar statements to those in the declaration of transfer, and this is entered on the register in a similar manner. (Sect. 27.)

If a transfer, either *inter vivos* or on death, is made to a person not qualified to own a British ship, the Court has power, on the application of any person interested, to order a sale of the ship, and such order will nominate some person to execute the transfer upon sale. (Sect. 28.) It is also open to a person interested to apply that transfer of the ship shall be prohibited for a specified time. (Sect. 30.)

Equitable Transfers.—A transfer of the equitable interest in a ship may be made without the formalities necessary for a transfer of the legal interest. It is, in fact, expressly provided that no notice of any trust is to appear on the register (sect. 65); but equitable interests may be enforced by or against registered owners, in the same manner as in respect of any other personal property. (Sect. 57.)

Mortgages of Ships.—The provisions as to the creation of a mortgage on a ship are analogous to those relating to the mode of transferring the ship completely. The mortgage is an instance of a *statutory mortgage*. An instrument making a ship, or a share in it, security for a loan, must be in the form provided in the schedule to the Act, and be registered at the ship's port of registry. (Sect. 31.) If there be more than one such instrument affecting a ship, the various mortgages are entered on the register in the order of their production to the registrar, and have priority *inter se*, not according to the date of their execution, but of their registration. (Sect. 33.) The effect of a mortgage is not to make the mortgagee owner of the ship, or to give him any of the powers of an owner, except such as are necessary for enabling him to realize his security. (Sect. 34.) This he may do by means of his power of sale. A sole mortgagee has an absolute power of sale over the ship; a puisne mortgagee has only a power exerciseable either with the concurrence of the prior mortgagees or under an order of the Court. (Sect. 35.) In case of the owner becoming bankrupt after having mortgaged his ship, the mortgage remains unaffected by the bankruptcy, and the mortgagee is preferred to the other creditors so far as the ship is concerned. (Sect. 36.) A mortgagee may transfer his mortgage by an instrument of transfer duly authenticated and registered (sect. 37); and on the mortgage being paid off, its discharge is entered on the register on production of the instrument of mortgage with the mortgagee's receipt indorsed upon it. (Sect. 32.)

APPENDIX F.—TABLE OF LIMITATIONS AS TO PROPERTY.

Subject-matter.	Statutes fixing Period.	Ordinary Period.	Extension for Disabilities.	Maximum.
Lands and hereditaments and profits of lands, ownership being in Crown.	9 Geo. 3, c. 17.	60 years.	None.	
Same, ownership being in Duke of Cornwall......	23 & 24 Vict. c. 53.	60 years.	None.	
Land and title to freehold rents, ownership in private person.	3 & 4 Will. 4, c. 27; 37 & 38 Vict. c. 57.	12 years.	6 years.	30 years.
Same, remainders, reversions, and executory interests in.	Same.	6 years from future interest, or 12 years from particular estate vested in possession.	Same.	Same.
Same, ownership being in charitable and ecclesiastical corporation sole.	3 & 4 Will. 4, c. 27.	Two incumbencies and 6 years, or 60 years, whichever may be the longer.	None.	
Advowsons	Same; and 6 & 7 Will. 4, c. 54.	Same.	None.	100 years.
Money charged on land, judgments and legacies ..	3 & 4 Will. 4, c. 27; 37 & 38 Vict. c. 57.	12 years.	None.	
Money secured by mortgage or right of redemption, mortgagee being in possession.	Same; and 7 Will. 4 & 1 Vict. c. 28.	12 years.	None.	
Arrears of rent or of interest on money charged on land, whether or not payment thereof secured by covenant, and of interest on legacies.	3 & 4 Will. 4, c. 27; and 37 & 38 Vict. c. 57.	6 years.	None.	
Rights of way, support, and water..............	2 & 3 Will. 4, c. 71, s. 2.	20 years; and 40 years (indefeasible).	None.	
Rights to light, as against private person........	2 & 3 Will. 4, c. 71, s. 3.	20 years.	None.	
Ditto, as against Crown	Same. (*Perry* v. *Eames*, (1891) 1 Ch. 658.)	No limitation.	..	
Covenants, recognizances, and bonds	3 & 4 Will. 4, c. 42; (In Ireland) 16 & 17 Vict. c. 113, ss. 20-23.	20 years.	Full period after removal of disability.	
Simple contracts; torts to property, save the following one.	21 Jac. 1, c. 16; (In Ireland) 16 & 17 Vict. c. 113.	6 years.	Same.	
Infringement of copyright	5 & 6 Vict. c. 45.	1 year.	Same.	

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